RECORD, CASE No. 13,814.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 214.

ALLAN C. DALZELL AND THE FAHYS WATCH CASE COMPANY, APPELLANTS,

vs.

THE DUEBER WATCH CASE MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 18, 1892.

1 The President of the United States of America to the Dueber Watch Case Manufacturing Company, Greeting:

[L. S.]

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of May, A. D. 1886, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Allan C. Dalzell and The Fahys Watch Case Company, and do further and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 31st day of March, in the year one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and tenth.

TIMOTHY GRIFFITH, *Clerk.*

HENRY S. WHITE,
Complainants' Sol'r.

The defendant is required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of May, 1886, or the bill will be taken *pro confesso* against it.

T. G., *Clerk.*

2 (Endorsed:) I hereby certify that on the 1st day of April, 1886, at the city of New York, in my district, I personally served the within subpœna upon the within-named The Dueber Watch Case Manufacturing Company by exhibiting to T. G. Hatch, agent of the above-named company, the within original, and at the same time leaving with him a copy thereof. Dated April 1st, 1886. (S'g'd) Martin T. McMahon, United States marshal, southern district of New York, by George Jefferys, deputy U. S. marshal.

(File-mark:) U. S. circuit court. Filed April 6, 1886. Timothy Griffith, clerk.

3 In the Circuit Court of the United States for the Southern District of New York.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.
} In Equity.

To the honorable judges of the circuit court of the United States for the southern district of New York:

Allan C. Dalzell, a citizen of the State of New York, and The Fahys Watch Case Company, a body corporate, duly created under the laws of the State of New York and having its principal place of business in said State, bring this bill of complaint against The Dueber Watch Case Manufacturing Company, a body corporate, duly created under the general laws of the State of Ohio, existing and having a place of business in said southern district of the State of New York.

And thereupon your orators complain and say—

That they are informed and believe that, prior to the 27th day of
October, 1885, your orator Allan C. Dalzell became and was the
first and your orator Allan C. Dalzell knows he was the original inventor
of certain new and useful improvements in apparatus for
making cores for watch crowns not known or used before his invention
thereof, and which was not known or used in this country
4 and not patented or described in any printed publication
in this or in any foreign country before his invention thereof,
and was not in public use or on sale more than two years prior to
his application for letters patent of the United States therefor; and
your orators further show unto your honors that your orator Allan
C. Dalzell, so being the first inventor of said improvements in apparatus
for making cores for watch crowns, made application to the
proper department of the Government of the United States for letters
patent, in accordance with the then existing acts of Congress,
and duly complied in all respects with all the requirements and
conditions of said acts of Congress, and that on said 27th day of
October, 1885, letters patent of the United States No. 329,284, signed,
sealed, and executed in due form of law, for the said invention or
discovery were issued to your orator Allan C. Dalzell, whereby there
was granted and secured to him, his heirs, executors, administrators,
and assigns, for the term of seventeen years from the said 27th day
of October, 1885, the full and exclusive right of making, using, and
vending the said improvement in apparatus for making cores for
watch crowns therein specified and claimed throughout the United
States and the territories thereof, as in and by said letters patent
or a certified copy thereof, in court to be produced, will more fully
and at large appear.

That your orators are informed and believe that prior to the 27th
day of October, 1885, your orator Allan C. Dalzell became and was
the first and your orator Allan C. Dalzell knows he was the original
inventor of certain new and useful improvements in apparatus for
corrugating cores for watch crowns not known or used before his
invention thereof and which was not known or used in this
5 country and not patented or described in any printed publication
in this or in any foreign country before his invention
thereof, and was not in public use or on sale more than two years
prior to his application for letters patent of the United States therefor.

And your orators further show unto your honors that your orator Allan C. Dalzell, so being the first inventor of said improvements in apparatus for corrugating cores for watch crowns, made application to the proper department of the Government of the United States for letters patent, in accordance with the then existing acts of

Congress, and duly complied in all respects with all the conditions and requirements of said acts of Congress, and that on said 27th day of October, 1885, letters patent of the United States No. 329,285, signed, sealed, and executed in due form of law, were issued to your orator Allan C. Dalzell, whereby there was granted and secured to him, his heirs, executors, administrators, and assigns, for the term of seventeen years from the said 27th day of October, 1885, the full and exclusive right of making, using, and vending the said improvement in apparatus for corrugating cores for watch crowns therein specified and claimed throughout the United States and the territories thereof, as in and by said letters patent or a certified copy of the same, in court to be produced, will more fully and at large appear.

And your orators further show unto your honors that on or about the 21st day of January, 1886, by an instrument in writing of that date, duly executed and delivered, your orator Allan C. Dalzell, for a valuable consideration, granted to your orator The Fahys Watch Case Manufacturing Company a license to make, use, and sell to others to be used the inventions, improvements, and
6 apparatus described in and secured by each of said letters
patent or intended to be secured thereby throughout the United States for and during the unexpired term of each of said letters patent; and in and by said instrument in writing it was provided that for and during the term of three years from and after the said 21st day of January, 1886, the said license should be exclusive, as in and by said instrument of writing, duly recorded in the Patent Office of the United States, or a certified copy thereof, to be produced in court, will more fully appear, and to which your orators, for greater certainty, crave leave to refer.

And your orators further show unto your honors that the said improvements in apparatus for making cores for watch crowns and for corrugating cores for watch crowns are of very great utility, and that they have been extensively applied by your orators to practical use, and that the public have generally acquiesced in your orators' exclusive right to the same, and that your orators have been and but for the infringement hereinafter complained of would still be in the undisturbed use, possession, and enjoyment of the exclusive privileges secured by the said letters patent and each of the same and in receipt of the profits therefrom.

And your orators further show unto your honors on information and belief that since the 21st day of January, 1886, and up to the time of the commencement of this action, the said defendant, against the will of your orators and in violation of your orators' exclusive rights, unlawfully, wrongfully, and injuriously, and with the intent to derive the profit which your orators would otherwise have made from their exclusive right in the said improvements, has used apparatus for making cores for watch crowns and for corrugating the same containing and embodying the said inventions and
7 improvements or material and substantial parts thereof, de-
scribed and claimed in the said several letters patent and in each of them, and has made large quantities of corrugated cores for

watch crowns with the aforesaid apparatus so used by it, and has sold the said corrugated cores for watch crowns so made in said southern district of New York with the intent to make profit therefrom, and to deprive your orators of the benefits and profits which they might and otherwise would have derived from their said exclusive rights, and is now engaged in selling corrugated cores for watch crowns in said southern district of New York and elsewhere in the United States manufactured by it from and with the apparatus employing the improvements described and claimed in the said letters patent of your orators and in each of the same, as aforesaid, and is engaged in the use of said apparatus as aforesaid, whereby the said defendant has infringed and is now infringing the said letters patent and each of the same; but how many of said corrugated cores for watch crowns so made in violation of your orators' rights, as aforesaid, the defendant has made and sold, your orators are ignorant and cannot set forth and pray discovery thereof; but your orators aver on information and belief that the said defendant has so made and sold or caused to be made and sold a large number thereof, and it has derived and is now deriving large profits therefrom; but to what amount your orators are ignorant and cannot set forth, but your orators believe the amount to be about the full sum of ten thousand dollars, and so charge the fact to be, and that your orators have been deprived of large profits and royalties by reason of the aforesaid infringements by the said defendant, and have thus sustained large damage therefrom.

8 And your orators further show unto your honors that the said improvements described and claimed in the said several letters patent Nos. 329,284 and 329,285 are so allied in character that they can be used in the same machine for completing cores for watch crowns, and the improvements of each of said letters patent are essential to the making of a completed core for watch crowns, and the cores for watch crowns so as aforesaid made and sold by the defendant have been so made by the use of the improvements described in and claimed by each of said letters patent.

And your orators further show that they fear and have reason to fear that unless the said defendant is restrained by a writ of injunction issuing out of this honorable court it will continue to use said apparatus and therewith to make and to sell the said corrugated cores for watch crowns in infringement of the said letters patent and of each of them and in violation of your orators' exclusive rights thereunder, and that it will thereby cause irreparable injury to your orators' aforesaid exclusive rights.

And your orators further show unto your honors that the said defendant has had notice of the said infringement and has been requested to refrain and desist therefrom, but has made no response thereto, and still continues to make, use, and vend said corrugated cores for watch crowns so made by it by the use of the inventions and improvements secured by said several letters patent.

Forasmuch as your orators can have no adequate relief save in this court, and as such proceedings are contrary to equity, to the end,

therefore, that the defendant may show, if it can, why your orators should not have the relief hereby prayed, and *may* the de-
9 fendant, The Dueber Watch Case Manufacturing Co., upon
the corporate oath of its president or other proper official, to the best and utmost of its knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises and the matters and things hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of said matters and as if the same were hereinafter repeated—

And your orators therefore pray that the said defendant may be compelled by a decree of this court to account and pay over to your orators all such gains and profits as have accrued to or been earned or received by said defendant from the unlawful use of the said inventions described in and secured by said several letters patent and from infringement thereof as aforesaid, and, in addition, to pay the damages sustained by your orators from such infringement.

And your orators further pray that the said defendant and its officers, agents, servants, and workmen, and each and every of them, may be perpetually enjoined and restrained by an injunction issuing out of and under the seal of this honorable court from directly or indirectly making, using, or vending the said improvements or inventions described and claimed in said two several letters patent No. 329,284 and 329,285 or in either of them or any part thereof, or any core for watch crowns made by the use thereof or of either of them; that each of said several letters patent may be decreed to be valid, and that the use of said apparatus and the manufacture and sale of cores for watch crowns made as aforesaid by the de-
10 fendant therewith to be an infringement of said letters pat-
ent and of each of them, and that the said defendant may be decreed to pay the costs of this suit, and that your orators may have such other and further relief as to this honorable court shall seem meet and shall be agreeable to equity.

Your orators further pray that a preliminary or provisional injunction may be issued out of and under the seal of this honorable court enjoining and restraining the said defendant, its servants, agents, and workmen, and each and every of them from further infringement of said letters patent or either of them during the pendency of this suit.

May it please your honors to grant unto your orators not only writs of injunction conformable to the prayers of this bill, but also the writ of *subpœna ad respondendum* out of and under the seal of this honorable court, directed to the said defendant, The Dueber Watch Case Manufacturing Company, commanding it or its legal representative, at a certain time therein to be named and under a certain penalty therein to be limited, to be and appear before this honorable court, then and there to answer unto this bill of complaint and to perform and abide by such order and decree in the premises as to this honorable court shall seem meet and may be required by the principles of equity and good conscience.

And your orators will ever pray, etc.

BOWMAN & BOWMAN,
Complainants' Attorneys.

S. A. BOWMAN, *Of Counsel.*

11 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Allan C. Dalzell, being duly sworn, deposes and says that he is one of the complainants in the foregoing bill named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he verily believes them to be true; and he further says that he verily believes the said Allan C. Dalzell in said bill named to be the original, true, and first inventor of the improvements in apparatus for making and corrugating cores for watch crowns, described and claimed in the said letters patent Nos. 329,284 and 329,285, and in each of the same mentioned in said bill of complaint; and, further, that he verily believes that the said complainants above named are the lawful owners of each of the said letters patent.

ALLAN C. DALZELL.

Subscribed and sworn to before me this 31 day of March, 1886.
(S'g'd) MELVIN BROWN,
Notary Public, Kings County.

Certificate filed in N. Y. county.

(Endorsed:) United States circuit court, southern district of New York. In equity. Allan C. Dalzell and The Fahys Watch Case Co. *vs.* The Dueber Watch Case M'f'g Co. Bill of complaint. Henry S. White, sol'r for compl't-, 160 Broadway, N. Y. city.

(File-mark:) U. S. circuit court. Filed Mar. 31, 1886. Timothy Griffith, clerk.

12 In the Circuit Court of the United States for the Southern District of New York.

ALLEN C. DALZELL and THE FAHYS WATCH CASE COMPANY
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY. } In Equity.

The plea of The Dueber Watch Case Manufacturing Company, defendant, to the bill of complaint of Allan C. Dalzell and The Fahys Watch Case Company, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill of complaint mentioned and contained to be true in such sort, manner, and form as the same are therein set forth and alleged, for plea to the whole of said bill saith that prior to the grant of the said letters patent upon which the bill of complaint is based and prior to the application therefor and prior to any alleged invention by said Dalzell of any part, feature, or combination described, shown, or claimed in either of said letters patent, the said defendant being then engaged in the manufacture of watch cases in the city of Newport, in the State of Kentucky, and said Dalzell having been in its employ as a tool-maker for a year preceding, it, said defendant, at the request of said Dalzell, re-employed said Dalzell at increased wages to aid in experimenting upon inventions, 13 upon machinery and tools to be used in the manufacture of various portions of watch cases; that said Dalzell did then and there agree with said defendant, on consideration of said increased salary as aforesaid to be paid to him and which was paid to him by this defendant, to dedicate his best efforts, skill, and inventive talent and genius towards the perfecting and improvement of watch-case machinery and such other devices as this defendant should direct and order, and in experimenting under the direction of this defendant for this purpose, and further agreed that any inventions or improvements made or contributed to by him, said Dalzell, should be patented at the expense of this defendant, and for its patent exclusively, and that said Dalzell should execute proper deeds of assignment at the expense of this defendant, to be lodged with the applications for all such patents in the United States Patent Office, and said patents were to be granted and issued directly to this defendant; that in pursuance of said agreement said Dalzell entered upon said employment and while thus employed at the factory of this defendant and while using its tools and materials and receiving such increased wages from it as aforesaid the said alleged inventions were made; that said patents were applied for with the permission of this defendant by the said Dalzell, and that all fees and expenses of every kind necessary or useful for obtaining said patents, including as well Patent Office fees as fees paid the solicitor employed to attend to the work incident to the procuring of said patents and drawing said assignments to this defendant, were paid by this defendant.

Defendant further avers that, notwithstanding the foregoing, said Dalzell did not sign the said deeds, although he had promised 14 so to do, but fraudulently and secretly procured the said patents to be granted to himself, of all of which this defendant avers the complainant The Fahys Watch Case Company had notice at and prior to the alleged making of the license by said Dalzell to it, more particularly referred to in the bill of complaint; and defendant avers that by reason of the premises the title in equity to said patents is in this defendant.

Wherefore this defendant doth aver and plead the several matters aforesaid in bar to the said complainants' said bill, and prays the judgment of this honorable court whether it should be compelled to make any further answer to said bill, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

JAMES MOORE,
Respondent's Counsel.
JOHN H. V. ARNOLD,
Associate Counsel for Respondents,
206 *Broadway, New York City.*

I hereby certify that in my opinion the above plea of defendant is well founded in point of law.

JAMES MOORE,
Respondent's Counsel.

15 UNITED STATES OF AMERICA, }
Southern District of Ohio. }

John C. Dueber, of lawful age, being first duly sworn, upon his oath says that he is the president of the Dueber Watch Case Manufacturing Company, the respondent above named; that the above plea of said company is not interposed for delay, and that it is true in point of fact.

JOHN C. DUEBER,
President Dueber Watch Case M'f'g Co.

Sworn to before me and subscribed in my presence this 28th day of May, 1886.

[SEAL.] S. S. CARPENTER,
Notary Public in and for Hamilton County, Ohio.

(Endorsed:) United States circuit court, southern district of New York. Allen C. Dalzell *et al. vs.* The Dueber Watch Case Manufacturing Company. Defendant's plea. James Moore, solicitor for defendant. United States circuit court. Filed June 4, 1886. Timothy Griffith, clerk.

16 U. S. Circuit Court, So. Dist. of New York.

ALLEN C. DALZELL and THE FAHYS WATCH CASE CO.
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.
} In Equity.

The replication of Allan C. Dalzell and The Fahys Watch Case Company, compl'ts, to the plea of The Dueber Watch Case Manfacturing Company, def't.

These repliants, saving and reserving to themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of said plea, for replication thereunto say that they will aver, maintain, and prove their bill to be true, certain, and sufficient in law to be answered unto, and that the said plea of the defendant is uncertain, untrue, and insufficient to be replied unto by these repliants;

17 without this, that any other matter or thing in said plea contained material or effectual in law to be replied unto, confessed and avoided, traversed or denied, and not herein well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

(S'g'd) S. A. BOWMAN,
Springfield, O., of Counsel.
(S'g'd) HENRY S. WHITE,
Sol'r for Compl'ts.

Dated at New York, the 5th day of July, 1886.

(Endorsed:) Circuit court of the U. S., southern district of New York. Allen C. Dalzell and The Fahys Watch Case Co. *vs.* The Dueber Watch Case M'f'g Co. Replication. Henry S. White, sol'r for compl't-, 160 Broadway, New York city.

(File-mark:) U. S. circuit court. Filed July 7, 1886. Timothy Griffith, clerk.

18 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 25th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable William J. Wallace, circuit judge.

ALLAN C. DALZELL *et al.*
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.

THE DUEBER WATCH CASE MANUFACTURING COMPANY
vs.
ALLAN C. DALZELL *et al.*

The above causes coming on this day for final hearing upon pleadings and proofs, Mr. James Moore is heard in behalf of the Dueber Watch Case M'f'g Co.

Further argument adjourned to the 26th inst.

TUESDAY, *February 26th*, 1889.

Before Hon. Wm. J. Wallace, circuit judge.

The argument in the above-entitled causes being resumed this day pursuant to adjournment, Mr. S. A. Bowman is heard in behalf of Dalzell and the Fahys Watch Case Co. Mr. Edmund 18*a* Wetmore is heard in behalf of Dalzell and the Fahys Watch Case Co. Mr. Moore closes in behalf of the Dueber Watch Case M'f'g Co.

C. A. V.

19 United States Circuit Court, Southern District of New York.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY, Complainants,
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY, Defendants.
} In Equity.

This cause coming on to be finally heard upon the pleadings, testimony, and exhibits filed herein, and having been fully argued by counsel for both parties and submitted, and due consideration having been had, this court doth find the equity of the cause to be with the defendant, and it is by the court therefore—

Ordered, adjudged, and decreed that the bill of complaint herein filed be, and the same is hereby, dismissed, and that the said defendant recover of the complainants their costs herein, to be taxed, and that unless the same be paid to them in thirty days from the
20 date of the taxation thereof execution issue therefor as upon judgments at law.

And the complainants having in open court prayed an appeal to the Supreme Court of the United States, the same is allowed; the amount of appeal bond to be in the penal sum of one thousand dollars, conditioned according to law, so as to operate as a supersedeas, with sureties to the approval of this court.

(Signed) WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of New York. Allan C. Dalzell and The Fahys Watch Case Company *vs.* The Dueber Watch Case Manufacturing Company. Decree. Wetmore & Jenner, attorneys for pl'ff.

(File-mark:) U. S. circuit court. Filed June 7, 1889. John A. Shields, clerk.

21 And the costs having been taxed by the clerk at eight hundred and eighty-nine and $\frac{77}{100}$ dollars ($889.77), the process, pleadings, and decrees, together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said The Dueber Watch Case Manufacturing Company, defendant, recover of said Allan C. Dalzell and The Fahys Watch Case Company, complainants, the sum of eight hundred and eighty-nine and $\frac{77}{100}$ dollars, the cost and charges as taxed.

Signed and enrolled this 19th day of July, A. D. 1889.

(Signed) JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States circuit court, southern district of New York. Dalzell *et al. vs.* Dueber Watch Case M'f'g Co. Final record. Wetmore & Jenner, compl'ts' solicitors. Costs, total, $889.77.

(File-mark:) U. S. circuit court. Filed July 19, 1889. John A. Shields, clerk. 3 p. m.

22 Circuit Court of the United States, Southern District of New York.

ALLEN C. DALZELL and THE FAHYS WATCH CASE COMPANY
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.

THE DUEBER WATCH CASE MANUFACTURING COMPANY
vs.
ALLEN C. DALZELL and THE FAHYS WATCH CASE COMPANY,

Decrees having been entered in both the above-entitled suits, in the first in favor of the defendant and in the second in favor of the complainant-, and appeals having been taken therefrom to the Supreme Court of the United States by the complainants in the first above-entitled suit and by the defendants in the second above-entitled suit, it is stipulated as follows:

If the said appeals in the said two causes shall be docketed,
23 both appeals may be heard upon the testimony taken in either
one of the causes; the transcript of the record in the second entitled suit to contain its proper pleadings and all the testimony and the record in full, including the decree and proceedings on appeal; the transcript in the first above-entitled suit to contain its proper pleadings, decree and proceedings on appeal, and clerk's certificate stating the testimony therein to be the testimony contained in the transcript of the other of the above-entitled suits.

Dated September 9th, 1889.

(Signed) JNO. H. V. ARNOLD,
JAMES MOORE,
For the Dueber Watch Case M'f'g Co.
BOWMAN & BOWMAN,
WETMORE & JENNER,
For Dalzell & Fahys W. C. Co.

(Endorsed:) Circuit court of the U. S., southern dist. of N. Y. Dalzell & The Fahys Watch Case Co. *vs.* The Dueber Watch Case M'f'g Co. The Dueber Watch Case M'f'g Co. *vs.* Dalzell & The Fahys Watch Case Co. Stipulation as to record on appeal.

(File-mark:) U. S. circuit court. Filed Sept. 17, 1889. John A. Shields, clerk.

23a Circuit Court of the United States, Southern District of New York.

THE DUEBER WATCH CASE MANUFACTURING COMPANY
vs.
ALLAN C. DALZELL & *al.*

ALLAN C. DALZELL & *al.*
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.

It is hereby stipulated that the foregoing may constitute the record to be sent by the clerk of this court to the clerk of the Supreme Court of the United States on the appeal to said Supreme Court in the above-entitled causes without prejudice to any motion to be hereafter made to correct the same.

And it is further stipulated that the model exhibits in the causes may be retained in the possession and custody of the clerk of this court until said hearing on appeal.

New York, October 10th, 1889.

(S'g'd) J. H. V. ARNOLD,
Sol'r for Dueber Watch Case Co.

(S'g'd) BOWMAN & BOWMAN.
23b *Sol'rs for Dalzell & Fahys Co.*
WETMORE & JENNER,
Of Counsel.

(Endorsed :) Filed Oct. 10, 1889.

24 Supreme Court of the United States.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY.

Know all men by these presents that we, Allan C. Dalzell, of Sag Harbor, New York ; the Fahys Watch Case Company of Sag Harbor, N. Y.; Hayden W. Wheeler and Lewis A. Parsons, of Brooklyn, New York, are held and firmly bound unto the Dueber Watch Manufacturing Company, a corporation organized under the laws of the State of Ohio, in the sum of one thousand dollars, to be paid to the said The Dueber Watch Case Manufacturing Company, its successors or assigns; to *whom* payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the fourteenth day of June, 1889.

25 Whereas the above-named Allan C. Dalzell and Fahys Watch Case Company have taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of New York :

Now, therefore, the condition of this obligation is such that if the above-named Allan C. Dalzell and the Fahys Watch Case Company shall prosecute their said appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

THE FAHYS WATCH CASE CO.,
[SEAL.] P'r HENRY F. COOK, *Treasurer.*
ALLAN P. DALZELL. [SEAL.]
HAYDEN W. WHEELER. [SEAL.]
LEWIS A. PARSONS. [SEAL.]

Sealed in the presence of—
JOHN H. IVES,
As to The Fahys Watch Case Company, Hayden W. Wheeler, Lewis A. Parsons.

Sealed by Allan C. Dalzell in the presence of—
THOS. F. BISGOOD.

26 STATE OF NEW YORK,
City and County of New York, } *ss:*

On this 14th day of June, 1889, before me appeared Henry F. Cook, to me personally known, who, being by me duly sworn, did say that he is the treasurer of the Fahys Watch Case Company, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and that he, said Henry F. Cook, acknowledged said instrument to be the free act and deed of said corporation.

JOHN H. IVES,
Notary Public, Kings & N. Y. Co. [SEAL.]

STATE OF NEW YORK,
County of Suffolk, } *ss:*

On this fifteenth day of June, 1889, before me personally appeared Allen C. Dalzell, to me known and known to me to be — individual described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same. 27

THOS. F. BISGOOD,
[SEAL.] *Notary Public in & for Suffolk Co., N. Y.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

On this 14th day of June, 1889, before me personally appeared Hayden W. Wheeler, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

JOHN H. IVES,
[SEAL.] *Notary Public, Kings & N. Y. Co.*

STATE OF NEW YORK,
City and County of New York, } *ss:*

On this 14th day of June, 1889, before me appeared Lewis A Parsons, to me known and known to me to be the individual de-
28 scribed in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

JOHN H. IVES, [SEAL.]
Notary Public, Kings & N. Y. Co.

STATE OF NEW YORK,
City and County of New York, } *ss:*

Hayden W. Wheeler above named, named in and who executed the foregoing bond, being duly sworn, says that he is a resident of said State of New York and a freeholder in said State and is worth the sum of two thousand dollars over and above all the debts and liabilities he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

HAYDEN W. WHEELER.

Subscribed and sworn to before me this 14th day of June, 1889.
[SEAL.] JOHN H. IVES,
Notary Public, Kings & N. Y. Co.

29 STATE OF NEW YORK,
City and County of New York, } *ss:*

Lewis A. Parsons above named, named in and who executed the foregoing bond, being duly sworn, says that he is a resident of said State of New York and a freeholder in said State and is worth the sum of two thousand dollars over and above all the debts and liabilities he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

LEWIS A. PARSONS.

Subscribed and sworn to before me this 14th day of June, 1889.
[SEAL.] JOHN H. IVES,
Notary Public, Kings & N. Y. Co.

(Endorsed:) Supreme Court of the United States. Dalzell *et al.* *vs.* Dueber Watch Case M'f'g Co. Bond.

30 The within bond is approved as to form, amount, and sufficiency of the sureties.

N. Y., June 17, 1889.

E. HENRY LACOMBE.
WETMORE & JENNER,
Sol. & of Counsel for Pl'ffs, 45 *William Street, New York, N. Y.*

[Endorsed:] U. S. circuit court. Filed Jun. 17, 1889. John A. Shields, clerk.

31 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one (1) to thirty (30), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Allan C. Dalzell and The Fahys Watch Case Company, complainants, against The Dueber Watch Case Manufacturing Company as the same remain of record and on file in said office; and I do further certify that, pursuant to the terms of a stipulation between counsel for the respective parties, on file, a copy of which is annexed to this record, copies of the testimony and exhibits in the above cause have been omitted from this transcript and incorporated in the transcript of record on appeal in the suit of The Dueber Watch Case Manufacturing Co., compl't, *vs.* Allan C. Dalzell and The Fahys Watch Case Co., def'ts.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the said United States the one hundred and fourteenth.

Seal of U. S. Circuit Court, South. Dist. of New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 13,814. S. New York C. C. U. S. No. 214. Allan C. Dalzell and The Fahys Watch Case Company, appellants, *vs.* The Dueber Watch Case Manufacturing Company. Filed October 18, 1889.

149 US 315

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1892.

Nos. 213 and 214.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY,
Appellants,
vs.
THE DUEBER WATCH CASE MANUFACTURING COMPANY,
Appellee.

BRIEF FOR APPELLANTS.

J. E. BOWMAN,
EDMUND WETMORE,
Counsel for Appellants.

C. G. BURGOYNE'S PRINTING BUSINESS, NEW YORK.

IN THE SUPREME COURT OF THE UNITED STATES.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY,
Appellants,

vs.

THE DUEBER WATCH CASE MANUFACTURING COMPANY,
Appellee.

No. 13,813.
Term No. 213.
Oct. Term, 1892.

ALLAN C. DALZELL and THE FAHYS WATCH CASE COMPANY,
Appellants,

vs.

THE DUEBER WATCH CASE MANUFACTURING COMPANY,
Appellee.

No. 13,814.
Term No. 214.
Oct. Term, 1892.

BRIEF FOR APPELLANTS.

Statement.

The above-entitled causes are two appeals by Allan C. Dalzell and The Fahys Watch Case Company from two decrees in equity rendered against them, and in favor of The Dueber Watch Case Manufacturing Company, by the Circuit Court of the United States for the Southern District of New York.

Case No. 13,814 was begun first by Dalzell and The Fahys Company against the Dueber Company by a bill filed March 31, 1886, to restrain the infringement by it of certain letters patent, Nos. 329,284 and 329,285, for Improvement in Apparatus for Making Cores for Watch Crowns; which letters patent had been granted to Dalzell, the inventor, on October 27, 1885, and an interest in which had been by him assigned to The Fahys Company.

To this bill, the Dueber Company, on May 28th, 1886, filed a plea in bar, alleging that prior to any application for either of said letters patent, and prior to any invention by Dalzell of any part or feature of the improvements covered by said letters patent, Dalzell, who had then been in its employ about one year, agreed, in consideration of an increase then made in his salary, to devote his inventive genius to the Dueber Company, and then and there for the same consideration further agreed that any inventions so made by him should belong to the Dueber Company, and should be patented for its benefit at its expense, and he would execute deeds of assignment therefor to be filed with the applications for such patents. That the inventions in question were made under this contract; that the Dueber Company had paid the expenses of procuring the letters patent for same; that Dalzell had refused to execute the assignments, and that the Fahys Company had acquired its interest in the patents with knowledge of the Dueber Company's rights.

To this plea general replications were filed by Dalzell and The Fahys Company.

After considerable testimony (including that of Mr. Dueber) was taken on the issue thus made up, Case No. 13,813 was begun in the same court by the Dueber Company (a citizen of Ohio) by bill filed January 17th, 1887, against Dalzell and The Fahys Company (citizens of New York), in which it claimed the equitable title to the two letters patent heretofore mentioned and also to three other letters patent granted Dalzell and referred to in said bill, the inventions covered by which it alleges were made by Dalzell while in its employ. This bill, contradicting the plea in bar, alleges that, after the inventions were made, Dalzell voluntarily agreed to convey these patents to the Dueber Company, and that he was to receive nothing for them, the only consideration being that the Dueber Company should pay the expenses of obtaining the letters patent. The bill further alleges that the Dueber Company paid the expenses of obtaining the letters patent, that Dalzell refused to assign and that the Fahys Company had an interest in the patents, which it acquired with notice; the prayer of the bill is for specific performance. The allegations of this bill are specifically denied by Dalzell and the Fahys Company in their separate answers filed thereto; to which answers a general replication was filed by the Dueber Company.

The two causes were heard together on the issue thus joined, all evidence in either of them being by stipulation of parties made applicable to both; and on final hearing the Court below sustained the pleas of the Dueber Company and dismissed the bill of Dalzell and the Fahys Company, and granted a specific performance to the Dueber Company as prayed for in its bill.

The two cases come into this Court upon one record of the evidence, printed in Case No. 13,813, which by stipulation of the parties is also the record for Case No. 13,814, and, as the questions involved in each are so closely connected, they are submitted together.

Assignment of Errors.

In both cases the appellants respectfully submit the decree of the Court below is contrary to law and against the clear weight of the evidence; and, further, that in Case No. 13,813 the Court erred in decreeing a specific performance, because the evidence, to say the least, left it in great doubt whether the agreement alleged by the Dueber Company in its bill of complaint was ever made by the parties, and because such alleged agreement was in its nature a hard, an unconscionable bargain, founded upon no sufficient or adequate consideration; and, further, the Court erred in its decree as against the Fahys Company in depriving it of the right to manufacture under these patents, which it had acquired without notice of the Dueber Company's claims.

ARGUMENT.

I.

The Undisputed Facts.

Dalzell, at the time of the alleged transactions, was without pecuniary resources, dependent upon his personal earnings for the support of himself and family (R., p. 21, Q. 43, 44).

He is a workman of great skill and long experience in the manufacture of jewelry and the various parts of watch-cases, particularly in the use of dies in connection therewith, and including a knowledge of the chemistry pertaining to the preparation of metals for such purpose. He was considered the most skillful machinist they ever had at Duhme's watch factory (Rec., p. 141, Q. 8, 9), and had charge of recovering the precious metals from the Bond street fire in New York (Rec., p. 279, Q. 48).

The evidence of his skill and experience is so apparent in the record that it is not necessary to make further particular citations.

It appears from the testimony that Dalzell came to Cincinnati in the summer of 1880. That his first regular employment there was for Fox Bros. in the fall of 1880. That he was next regularly employed at Duhme's from January, 1881, to the fall of 1882. That he was then employed a short time at the Queen City Sewing

Machine Company, and then, in the latter part of January, 1883, entered the employ of the Dueber Company.

That the first six weeks he was there he was in the tool department in Factory "B," and then, upon the arrival of a dynamo and other appliances for gilding and plating, he was placed in charge of that department upstairs in Factory A. That in November, 1883, his brother Rudolph came from New York to work at Dueber's, and, after instructing him for some time, he left him in charge of the gilding department, and went to work by himself in Factory A. That there then arose in Factory A a new department, devoted to the making of plated pendants, bows, etc., in dies by presses. Dalzell being the only machinist, subject himself to no one's instructions, but having supervision of boys and girls who operated the presses, and that some time in the summer of 1884, watch crowns were being manufactured in quantities in this new department under Dalzell by the method and inventions involved in this case, which was the first time watch crowns—other than a few hand-made solid-gold crowns—were ever manufactured in the Dueber factory.

Dalzell left the employ of the Dueber Company about January 19th, 1886, and on January 22nd, 1886, was employed by the Fahys Company and granted it the exclusive right to manufacture and sell under the patents in controversy, so long as he remained in its employ, and the right, not exclusive, to manufacture and sell thereafter during the life of the patents; and, subsequently, granted it an interest in the patents themselves.

II.

Claims of the Respective Parties.

In case No. 13,814, begun by Dalzell and the Fahys Company against the Dueber Company, only the patents for making the covers for watch-crowns, are involved; which core patents are, by far, the most valuable of all the inventions in question.

Dalzell and the Fahys Company claim that though Dalzell was on and about October 27th, 1885, when said letters patent were issued to him, in the employ of the Dueber Company, yet the invention in said letters patent described had been made by Dalzell before he entered the employ of the Dueber Company, and that before he entered the employ of said company he had made watch crowns by said method, having constructed the tools for that purpose in his spare moments at various machine shops in Cincinnati and at his home in Newport, Ky. That, after he entered the employ of the Dueber Company, he there adapted said tools and method to double-action and other presses with the permission of Mr. Dueber, and in order to prove to Mr. Dueber the utility and practicability of his said inventions, and for the purpose of selling the same to the Dueber Company, though no definite agreement in regard to such sale was ever reached.

It is admitted that the Dueber Company paid part of the expenses for obtaining said letters patent, but Dalzell and the Fahys Company claim such moneys were paid as an aid to Dalzell in securing such patents, since he had no money for such purpose, and as a loan to be repaid, there being then still no understanding reached as to the sale of said inventions to the Dueber Company, nor as to their right to manufacture thereunder, though Dalzell then still expected he would be able to sell them to Dueber for a valuable consideration, while Dueber, as is now apparent, intended to obtain them without paying Dalzell anything for them.

It is denied that the Fahys Company had any notice or knowledge that the Dueber Company claimed any interest in said patents until after Dalzell had granted to said Fahys Company the right to work under said inventions and letters patent by the writing, dated January 21, 1886, being Dueber Company's "Exhibit Dalzell-Fahy's Assignment No. 1" (Rec., p. 540).

On the other hands, as we have seen, the Dueber Company claims the inventions were made by Dalzell while in its employ, and in its plea in case 13,814, it claims he agreed to assign them to it in consideration of an increased salary, the duration of which is nowhere fixed, which agreement was made when the salary was increased, and before the inventions were discovered; while, in its bill in case 13,813, it claims he agreed to assign them to it for nothing, if it would pay expenses of obtaining letters patent, which latter agreement is alleged to have been made long after the increase in salary, and after the discovery of the inventions. Both these pleadings are sworn to by John C. Dueber, its president and principal stockholder (Rec., p. 233, x-Q. 78).

In his testimony, taken before the bill was filed, Mr. Dueber, who is the only witness on this point, abandons the statements of the plea and adopts the version, thereafter set up, in the Dueber Company's bill (Rec., p. 226, Q. 24). So that the pretended contract set up in the plea is unquestionably disproved.

The issues thus joined between the parties, and the testimony taken in support of the same, are to be considered by the Court for two purposes: First, to determine whether the Dueber Company has established a right to the equitable remedy of specific performance against Dalzell and the Fahys Company, or against either of them, in respect to any or all of these inventions; and, second, to determine whether said Dueber Company has established a defense to the bill of Dalzell and the Fahys Company; and, though the *degree* of proof required is different for these two purposes, yet, it may be here remarked, the *burden* of proof is on the Dueber Company in each instance.

III.

The Dueber Company is not entitled to a specific performance.

In *Hapgood vs. Hewitt*, 119, U. S., 232, it was held in a suit by the trustees of a corporation to compel a former employee to transfer to them a patent for an invention made by him while in their employ, that in the absence of an *express contract to convey the patents* the employer is not entitled to the patent for an invention made by the employee in the course of his employment; and this, too, on demurrer to a bill which contained the strongest allegations of a hiring of the employee's inventive genius and faculties.

Hence, if the Dueber Company is entitled to these inventions, it must be solely by virtue of some valid and enforceable contract with Dalzell.

Postponing, therefore, the discussion of the question as to when Dalzell invented these improvements, we respectfully submit the Dueber Company is not entitled to specific performance for the following reasons:

1st. Because, considering the value of the inventions and the nature of the alleged contract to transfer them to the Dueber Company, it is a hard and unconscionable bargain without any adequate consideration.

Without going into details, the inventions made by Dalzell, and which are the subject of controversy, relate to a new method of manufacturing watch crowns and to devices for carrying out that method. The chief feature of these inventions consists in making the core in dies consisting of three parts ; so that, by Dalzell's method, the core is formed by two operations in a press operated by unskilled labor ; whereas, by the old method, the core was turned on a lathe, and the corrugations milled in by a milling machine, a process requiring numerous operations and the most skilled labor. The details of this new method, and also the old method of manufacture will be found described in the letters patent (Rec. p. 524 *et seq.*), and also in Dalzell's testimony (Rec. p. 25, Q. 73, and p. 26, Q. 74).

It appears from the testimony that this new method reduces the cost of manufacture of watch-crowns about five cents per crown (Rec., p. 27, Q. 79, 80, and Rec., p. 265, Q. 116). This testimony is not attempted to be contradicted, though Alexander Milne, a crown manufacturer of Newark, New Jersey, was on the stand for the Dueber Company (Rec., p. 497).

The testimony of Mr. Dueber on this subject is so important that we beg leave to quote it (Rec., pp. 336, *et seq.*) :

" 127 x-Q. Do you now regard the inventions covered " by the patents sued on in this case of any value ?

" A. Yes, sir.

" 128 x-Q. When did you first so regard them ?

" A. After we had spent so much money for the tools.

" 129 x-Q. Is the value of the tools the only value " that you attach to the inventions referred to ?

" A. No, sir. It is also the time spent in getting them " up. You cannot change your system of tools without " throwing everything away.

" x-Q. 130. But do you regard the inventions them- " selves, as described in said patents, to be of any " value ?

" (Objected to as immaterial.)

" A. Yes, sir ; because we have spent a great deal of " money on them.

" x-Q. 131. But I mean, irrespective of what money " you have spent on them, do you regard the inventions " as valuable?

" (Objected to as indefinite, it not appearing what " the word valuable means in that connection.)

" A. The value of a patent cannot be ascertained " until you have found out how much the tools cost " you, or how much it costs to put the goods on the " market.

" x-Q. 132. But you have ascertained these facts in " regard to the inventions referred to, have you not?

" A. Yes, sir.

" x-Q. 133. Then will you please answer question " No. 131?

" A. I place their value on what it would cost us to " change to another system.

" 134 x-Q. Is that the only value you attach to " them?

" A. That is considerable.

" 135 x-Q. Is that the only value you attach to " them?

" A. That is value itself. I don't know that I can " answer it any closer.

" 136 x-Q. So I understand; but is it the only value " you attach to it?

" A. I can't see how you can come to the value of a " patent. It is what a man will give you, isn't it? " You will have to put your question in a different way.

" 137 x-Q. Do you know of any other system of " manufacturing crowns to which you could change?

" Objected to as irrelevant and immaterial.

" A. Yes, sir.

" 138 x-Q. Name as many different systems as you " know?

" A. Making them as everybody else makes them. " There is no secret about that.

" 139 x-Q. Does everybody else make them in the " same way?

" A. Yes, sir; all kinds that have any commercial " value.

" 140 x-Q. Is there any difference in the cost of pro- " duction by the Dalzell method and the cost of pro- " duction by the old method ?

" A. I cannot state that.

" 141 x-Q. Are you still manufacturing crowns ac- " cording to the Dalzell method ?

" A. No, sir; not altogether.

" 142 x-Q. To what extent are you so doing ?

" A. We make them with fewer operations.

" 143 x-Q. Do you make any crowns by the Dalzell " method ?

" A. No, sir; not altogether.

" 144 x-Q. Do you make any crowns without pro- " ceeding at all by the Dalzell method ?

" Objected to as being too uncertain and indefinite " to be capable of a responsive answer, it not appear- " ing from anything in this case that there is a " Dalzell method of making crowns.

" A. Some of that kind of tools we use and some not.

" 145 x-Q. Please describe in what respect your " present method of manufacturing crowns differs from " the method described in the said Dalzell patents ?

" Objection repeated.

" A. We make the cores with fewer operations, and " also the shells.

" 146 x-Q. What particular operations do you omit ?

" A. The cutting of the wire before the core is made, " and the clipping of the shells before they are used.

" 147 x-Q. Do you mean that these operations are " omitted ?

" A. Yes, sir.

" 148 x-Q. Have you a different operation from that " described in the Dalzell Patent for doing those " things ?

" A. Yes, sir.

" 149 x-Q. Please describe your operation ?

" A. I decline to answer.

"150 x-Q. Is there any other respect in which your
"method of making crowns differs from the Dalzell
"method?

"A. No, sir."

Mr. Dueber has, evidently, applied to the Dalzell inventions the feature of cutting the metal by the same blow of the press which makes the core that he says (Rec., p. 224, Q. 7) he once saw in operation in a rivet machine.

The testimony of Mr. Dueber's is so palpably untrue, and so at variance with all his past actions, especially his strenuous exertions to secure the exclusive right to these inventions for himself, that its only effect, it seems to us, is to show the unfairness and unreliability of the witness. He says he is now manufacturing by this method, with the exception of two operations, *viz.*, the cutting of the wire before the core is made and the clipping of the shells before they are used, and in answer to x-Q. 245 he says that process reduces the cost one-third.

He considers this improvement (utterly worthless without the use of the Dalzell inventions) so valuable that he refuses to tell what it is; and at the same time escaped from disclosing the value of Dalzell's Patents by pretending he don't understand what is meant by the value of a patent.

This conduct of Mr. Dueber is, we submit, sufficient of itself to prevent a specific performance, for a court of equity requires of its suitors full and fair disclosure that the court may clearly understand the equity of the case.

As was said by Mr. Chief-Justice WAITE in *Crosby vs. Buchanan*, 23 Wall., 420, p. 457:

"*Honesty of purpose prompts frankness of statements.*
"*Concealment is indicative of fraud.*"

The letters patent themselves are sufficient evidence of the *utility* of these inventions, and their value must be conceded to be very great.

A watch-crown is an article used by nearly every wearer of a watch in the United States. The record discloses numerous factories over the United States which are devoted to the manufacture of watches, and it is matter of common knowledge that a large number of watch-crowns must be used yearly; so that a method reducing their cost about five cents apiece must be of immense value. Mr. Dueber says his concern manufactured one hundred thousand crowns from the time it began to make them, in the summer of 1884, to September, 1886, a period of two years; and that that was only four-fifths of the number actually used in his concern, (Rec., p. 235, Q. 95 to 97). So that the profits in the Dueber concern alone on this invention would be about $2,500 per year.

From the position taken by Mr. Dueber in his testimony (Rec., p. 226, Q. 24), it appears nothing was to be paid Dalzell for these patents, and that the only consideration was that the Dueber Company should pay for obtaining the letters, *viz.*, the sum of $456.50 (Rec., pp. 232 *et seq*).

We do not expect to enlighten your Honors as to the legal principles controlling the subject of specific performance; but, for convenience, present a few authorities:

" I lay it down as a general proposition, to which
" I know no limitation, that all agreements, in order to
" be executed in this Court, must be certain and de-
" fined; secondly, they must be equal and fair, for this
" Court, unless they are fair, will not execute them,
" and, thirdly, they must be proved in such manner as
" the law requires."

Lord ROSSLYN in Walpole vs. Oxford, 3 Ves., 420.

" In such a contract as this there is neither reciproc-
" ity, fairness, nor good conscience, and, if the de-
" fendant was simple enough to consent to such an
" agreement, a court of equity will not compel him to
" execute it specifically, but leave the parties to their

"remedies at law, which has no conscience and knows "no mercy. In order to induce a court of equity to "enforce specifically a contract, it must be founded on "a good consideration, it must be reasonable, fair and "just. If its terms are such as our sense of justice revolts at, the Court will not enforce it, though admitted to be binding at law."

Underwood, J., in Lear vs. Chotteau, 23 Ill., 39, p. 40.

"It may be added that the complainant must show "no oppression or unconscionable advantage, when he "comes into a court of conscience, asking for a remedy "beyond the letter of his strict rights. He must not "ask for a favor beyond his technical, legal rights "when he bases his claim to that favor upon a hard, "oppressive or technical advantage. He must stand "before the Court, prepared to meet its scrutiny without a blush, relying upon the advocacy of a well-regulated conscience in his favor."

Caton, J., in Stone vs. Pratt, 25 Ill., 25, p. 34.

"In general, specific relief will be granted when it is "apparent from a view of all the circumstances of the "particular case that it will subserve the ends of justice, and it will be withheld when, from a like view, "it will produce hardship or injustice to either of the "parties."

Field, J., in Willard vs. Taylor, 8 Wall.

"Where a contract is hard and destitute of all "equity, a court of equity will leave the parties to "their remedy at law."

King *et al.* vs. Hamilton *et al.*, 4 Peters, 311.

Even when the purchase was made at judicial sale, this Court has refused the relief of specific performance because the consideration was so inadequate as to shock the conscience.

> Randolph's Executor vs. Quidnick Co., 137 U. S., 457.
> M. & M. R. R. Co. vs. Cromwell, 91 U. S., 643.

The consideration in the case at bar may not be so grossly inadequate as in the two cases last cited; but authority is not needed to the proposition that the Courts examine the consideration much more critically when the purchase is made privately than when it is made openly and publicly at a sale conducted and approved by a court of justice.

Indeed, the English rule eliminated the question of adequacy of consideration entirely when the purchase was at judicial sale.

> See cases cited in *Seymore vs. Delancy*, 6 Johns. Ch., 222, p. 229.

In *Seymore vs. Delancy*, a leading case on this subject and one frequently cited with approval by this Court, Chancellor Kent refused specific performance in case of a private purchase, on the ground that the consideration was only half the value of the property, and his decision was affirmed by the Court of Errors (3 Cowen, 446).

Besides, Mr. Dueber was Dalzell's superior. Dalzell was his servant, and dependent on him for his daily bread, and Mr. Dueber asserts that, at the time of this alleged bargain, he told Dalzell the inventions were of no value; that they were not worth patenting (Dueber's testimony, Rec., p. 227, Q. 29).

If a gentleman should call his impecunious servant into his library, and, representing to him that his property was of no value, obtain an agreement from the servant to transfer to him property worth more than $5,000 for less than $500, would any court of equity grant him specific performance?

But that supposed case is much fairer than the one at bar, for, in that case, the $500 went into the pocket of the servant, while, under the alleged contract sought to be enforced at bar, not one cent goes to the benefit of Dalzell.

Can that be called a fair contract in which all the benefits are on one side?

In *Pope Manufacturing Co. vs. Gormully*, 144 U. S., 224, where this Court refused specific performance solely on account of the unconscionable nature of the contract, Gormully received a license to manufacture under certain patents in consideration of the extensive obligations he entered into, while, in the pretended contract in this case, Dalzell gives up all he has, and receives in return *nothing*.

By this contract he would surrender himself, bound hand and foot, into the power of Dueber, so that his wages could at any time be reduced, or he be summarily discharged, without the power thereafter to practice his inventions himself for the support of his family!

This claim of the Dueber Company, from its very nature, is not such as commends itself to a court of equity.

The design of the patent laws is to reward those who make some substantial invention or discovery which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favors.

If the contract for which the complaint seeks specific performance could be carried out, Mr. Dueber would, by the aid of the Court, thwart this design in Dalzell's case, and take to himself the whole benefit of Dalzell's invention, leaving Dalzell nothing at all.

If the alleged contract, of which specific performance was asked, were the one stated by Mr. Dueber in such detail in his plea in bar, *viz.*, that the patents were to be assigned in consideration of an increased salary to be paid Dalzell, and that salary was secured to him for any reasonable time, there might be some claim of fairness in the transaction; but under the terms of the pretended contract set up in the Dueber Company's bill, and testified to by Mr. Dueber, he could obtain Dalzell's patents for nothing, and then discharge Dalzell forthwith. Dalzell could be turned out with nothing, leaving the Dueber Company in the enjoyment of his inventions and in possession of the monopoly, so that Dalzell himself could not earn his living by working these inventions, and yet it is claimed the terms of the contract are fair, equitable and just!

We respectfully submit, even if the pretended contract were clearly proved, its terms, the nature of the alleged consideration and the attending circumstances are such that Mr. Dueber comes with "poor grace" into a court of equity for aid.

Conceding, for sake of argument, that Dalzell discovered these inventions while in Dueber's employ, that in the language of the Circuit Judge, he did what he was paid to do; the consideration paid would, at the utmost, only entitle the Dueber Company to a shop right, and would not, at all, furnish a consideration for the patents themselves.

Hapgood vs. Hewitt, 119 U. S., 232.

2D. THERE IS NO PROOF OF THE CONTRACT ALLEGED IN THE DUEBER COMPANY'S BILL, SUFFICENT TO JUSTIFY A DECREE OF SPECIFIC PERFORMANCE.

(a) Inconsistent grounds vpon which Dueber has claimed these inventions:

It is perfectly manifest from the record that Mr. Dueber, at first, thought to secure these inventions solely by virtue of the pretense that the same were made by Dalzell while in his employ.

In his printed notice, or circular, dated February 2d, 1886, notifying the world he claimed the patent granted Dalzell and also those for which applications were pending, and which it appears (Rec., p. 237, Q. 129 *et seq.*)

he assisted his attorney to get up, the grounds of his claim are stated as follows (Rec., p. 241): "*The inventions* " *upon which said patents are granted and said applica-* " *tions are based having been made by said Dalzell while* " *a workman in the employ of said Dueber Watch Case* " *Manufacturing Company, and at the request of said* " *company, the said company being at all the expense of* " *getting up said inventions, and procuring said patents* " *and filing said applications.*"

On March 15th, 1886, Dueber filed a bill against Dalzell in the Superior Court of Cincinnati, to compel an assignment of these patents, which was subsequently dismissed for want of jurisdiction. In this bill he alleges (Rec., p. 211): "That at the time of the mak- " ing of application for said letters patent, it was " agreed, *for a valuable consideration before that time* " *paid*, that said patents and inventions were the prop- " erty of this plaintiff." This petition is verified by the positive oath of Mr. Dueber, an interlocutory injunction being sought and obtained on its averments.

The averments of this petition are utterly inconsistent with the averments of his plea in bar, filed in case No. 13,814; for the plea avers (Rec. in case 13,814, p. 7) that the consideration of the agreement to transfer the patents was an increase made in Dalzell's wages at the time of the agreement and before the inventions were discovered by Dalzell, which increased wages were *thereafter to be paid.*

The evidence shows conclusively that both the statements of the Cincinnati bill and of the plea in bar must have been known by Mr. Dueber to be false; for it appears that Dalzell's wages were not raised until November, 1884 (Dueber's testimony, Rec., p. 224, Q. 12); and it further appears, by the uncontradicted testimony of witnesses on both sides, that before November, 1884, *viz.*, in the early summer of 1884, the Dalzell process of crown-making was in operation in Dueber's shops. Dalzell says (Rec., p. 23, Q. 58) he began to make crowns at Dueber's by the middle of the year

1884. Our witness, Annie Yockey, says (Rec., p. 142, Q. 6) she went to work at Dueber's March 11, 1884, and (Rec., p. 146, x-Qs. 66, 74) that she was closing crowns when Butts came to work. Butts came to work about September 1st, 1884 (Rec., p. 83, Q. 13).

Henry Stecht (Dueber's witness) came to work July 9th, 1884, and found them making one size crown (Rec. 400, Q. 6, 8).

John Price says (Rec., p. 515, Q. 2, 3 and 4) he went to work at Dueber's August 12th, 1884, and the first work he did there was cutting the brass wire for cores and turning out crowns.

In brief, in the Cincinnati bill, Dueber swears that, at the time of the agreement by Dalzell to convey these patents, the consideration for such agreement had already been paid; in the plea in bar he swears that the agreement was made before the inventions were discovered, and at the time of such agreement the consideration had not yet been paid, but was an increase in wages, thereafter to be paid, and in his bill in case No. 13,813 he swears that the agreement was made long after the increase in salary and after the inventions were discovered, and was voluntary on Dalzell's part, the only consideration thereof being that Dueber should pay the expenses of obtaining the letters patent. The Court must not fall into the error of thinking Dueber could state his claims in his bill filed in this case and then give consistent evidence in support of it; *for the evidence was given first in case No. 13,814, and then the bill was drawn to meet the proof.*

When we consider that Mr. Dueber is the only witness that swears Dalzell ever concluded any agreement to assign these patents to the Dueber Company, the case at bar assumes much the same aspect as *Cox vs. Cox*, 2 Casey (26 Pa. St.), 375, which was disposed of by Judge LOWELL as follows (pp. 381, 382):

" The defendant relies on two inconsistent equitable " titles: one being that the land was bought for him " with his own money, and that, therefore, the equi-

"table title resulted to him, though the legal title was "in his father; and the other, that the land was a "gift to him by his father. His defense is a claim in "equity for specific performance of the trust, or gift, "by transferring to him the legal title; how, then, does "he stand in court?

"He says, in effect, my father has the only title that, "in strict law, can be taken notice of; but he ought, in "equity, to convey it to me. I do not exactly know "why he ought to do so; but he bought it for me with "my money, or he gave it to me, I cannot say which. "Both cannot be true, but I ask the Court to hear me "try to prove both, and to give me the conveyance on "the ground which I shall come nearest to proving, or "to give it to me because some of the jury may say "one and some the other is the true ground, and be"cause, therefore, neither of them is found true.

"Such a claim, if distinctly set out, would be re"jected on first presentation. It is only when its in"congruity is covered up in a mass of conflicting evi"dence that it could be suffered to pass. The essential "grounds of his claim are evidence that he has no "honest claim at all. If this land was given to him, "or bought for him with his money, he must have "known it, and which way it was. To say both is false. "To say that he does not know which, is to admit that "neither is true. In his own opinion, one of them may "be true, and only one, and on that he must rely. "Equity does not lend its aid to experiments on legal "titles in favor of those who can present no distinct "and consistent claim. It sanctions no war of which "the manifesto is false on its face."

When Mr. Dueber swore to the plea in bar, in Case 13,814, that the inventions were made after Dalzell's salary was raised, in November, 1884, and pursuant to an agreement, then entered into, that Dalzell's inventions when discovered should belong to the Dueber Company, he did not know that conclusive proof could be offered that the inventions were in operation in his shop prior to November, 1884.

So, when he comes to testify in the case, he is driven to rely on the pretense that Dalzell agreed after the discovery of the inventions to transfer the patents solely in consideration that he would pay the expenses of obtaining them.

That Mr. Dueber is not a trustworthy witness, we feel justified in asserting. Among the many evidences of this fact in the record the following is prominent.

In the Dueber circular notice of February 2d, 1886 (Rec., pp. 241, 242), which Mr. Dueber assisted his attorney to prepare (Rec., pp. 237 and 238, Qs. 129, 132), he states that *as soon as convenient he will take steps to compel a transfer of the legal title to the patents;* and, manifestly, the only object of the notice was as preparatory to such a proceeding. Thereafter, on May 4, 1886, when a motion had been filed by Dalzell to set aside service in the Cincinnati suit on the ground that Dueber had brought him into the jurisdiction on a criminal charge for the purpose of instituting a civil suit, Mr. Dueber swears, by affidavit (Rec., p. 211), that at the time of Dalzell's arrest (which occurred long after February 2d, 1886) he had no intention of instituting such civil suit; that he did not think of instituting it until March 15th, 1886, and that never before that day had he consulted a lawyer in relation thereto.

The circumstances surrounding this pretended agreement, and the evidence relating thereto, are confined within a very narrow compass.

It appears from Mr. Dueber's testimony that on the trial the idea of an agreement to transfer the patents made at the time Dalzell's wages were raised, and in consideration of such increased wages, is entirely abandoned and the *voluntary* transfer idea adopted.

Mr. Dueber says (Rec., p. 225):

"12 Q. How was Mr. Dalzell paid for his services by "your company during the time of his employment, and "if the wages differed during different periods, state

" the facts fully, with dates of changes of his wages, as " nearly as you can state such dates?

" A. He was employed with us at twenty-five dollars " per week from February, 1883, until November, 1884; " then his wages was raised to thirty dollars per week, " and he received that pay during the balance of the " time he stayed with the company; he left Tuesday " January 19, or 16, 1886.

" 13 Q. Please state the circumstances which induced " your company to increase Mr. Dalzell's wages at the " time they were increased.

" A. Mr. Dalzell came to me in the office and he says, " 'Mr. Dueber, a year is now up since I worked for you " ' in this factory (that was factory A; he formerly " ' worked in factory B from February to November); I " ' suppose you are satisfied with the improvements I " ' have made, and I have come to have my wages raised, " ' and I will show you that if you raise my wages the " ' improvements I will make this year will justify you " ' in doing so.' I asked him what wages he wanted; he " said thirty dollars per week, and he was paid that " until the time he left. When that year was up nothing " was said about wages."

And again (Rec., p. 226), Mr. Dueber says:

" 23 Q. Who first suggested the idea of patenting " these devices, and when?

" A. Mr. Dalzell, in the spring of 1885.

" 24 Q. Please state all that took place at that " time?

" A. Mr. Dalzell came to me and said, 'Mr. Dueber, " ' we have got a very good thing here. Let us patent " ' this for the benefit of the concern. We have some " ' men here who may run away and carry those ideas " ' with them.' I objected at first. Finally, he says, " ' If you will pay for getting them out, I don't want " ' anything for them.' I then said: 'Let us go over " ' to Mr. Layman to-morrow and attend to it.' He " said he knew a more competent lawyer than that that " he would send for."

And again (Rec., p. 227) :

" 29 Q. In your answer to Q. 24, which will be read " to you, you report Dalzell as saying, substantially, " that if you would pay for getting out the patents he " would not want anything for them. What I desire to " know in this particular is what, if anything, had " occurred between you and him which would suggest " or justify his seeming doubt as to whom these pat- " ents should belong ?

" Complainants' counsel objects to the foregoing " question as leading, incompetent and improper. " Question 24 and answer having been read to the " witness :

" A. Nothing had occurred between us, except that " I did not think the improvements of enough value to " patent them and pay for them."

It is evident Dueber's counsel expected a different answer to this skillfully framed question. He expected Dueber to say something about an understanding at the time the wages were increased ; but Mr. Dueber forgot his part. This is the explanation of the fact that the bill in case No. 13,813, filed after this testimony was taken, departs so radically from the plea in bar in case No. 13,814.

This alleged conversation narrated by Mr. Dueber is entirely uncorroborated ; and Dalzell flatly denies it (Rec., p. 31, Q. 98, *et seq.*).

The only other testimony in the record relating to this point is the testimony of Deuber's witnesses, W. A. Moore and John A. Coburn.

Mr. Whitney, of Springfield, Ohio, was the attorney selected by Dalzell to obtain the letters patent, though Mr. Deuber had a regularly employed and satisfactory patent attorney of his own (see his answer to Qs. 111 to 113, Rec., p. 236).

Mr. Critchley, Dueber's witness, says (answer to Q. 129, Rec., p. 494), that he suggested to Dalzell to procure his own counsel in preference to one of Mr. Dueber's.

It appears that Mr. Dueber, without the knowledge of Dalzell, wrote Mr. Whitney to send him forms of assignments, transferring these patents to the Dueber Company, and that Mr. Whitney sent them (see Dueber, Qs. 38, 39, Rec., p. 230, and x-Q. 115, *Id.*, p. 236).

These assignments (which, by a mistake in printing, appear in the record to be signed by Dalzell, the said mistake being, however, cured by stipulation), arrived in Newport in Mr. Dueber's absence and were received by W. A. Moore, manager of the Dueber Company, who says he presented them to Dalzell. His account of the interview is as follows (Rec., p. 239):

" Q. 2. Please examine and state whether you have " ever seen before 'Respondent's Exhibits Whitney " Assignments Nos. 1 to 6.' State when first?

" A. I have seen them before, some time in the latter " part of June or the first part of July, 1885.

" Q. 3. State whether you ever had any conversa-" tion with Allan C. Dalzell with reference to his sign-" ing those papers. State when and where such con-" versation occurred, if it did at all, who were present " and what was said by each of you?

" A. I have had such conversation, some time in " July or August, 1885, in our private office at the " factory in Newport. No one was present but Mr. " Dalzell and myself. I spread these papers on Mr. " Dueber's private desk. I told Mr. Dalzell that these " were the assignments received from Whitney, and " requested him to sign them. He hesitated a moment " and said he would sign them as soon as the patents " were all issued. I asked him what difference that " made. He gave no definite answer or any reason, " except that he wished to wait until the patents were " all issued. I don't remember positive any further " conversation."

Mr. Dalzell's account of this interview is as follows (Rec., pp. 29, 30):

" Q. 93. Do you remember an occasion when certain " assignments were presented to you by Mr. Moore,

" the superintendent of the defendant, and, if yea, " please state how it was?

" A. I do remember the event. I have not the " date precisely; it was at the noon hour; I was just " returning from lunch. I think it was about the early " part of July.

" Q. 94. Please state this interview with Mr. Moore?

" A. Passing the office, Mr. Moore called me in—he " standing at the window. He said he wanted to " see me upon business. I went in; it was a very " warm day. Mr. Moore was sitting down with his " coat off; he said 'How-dy-do, Dalzell;' I said 'How- " 'do-you-do, Mr. Moore.' He said, 'It is a devilish " 'hot day.' 'It is,' said I. He said, 'I would like to " 'be at Saratoga.' 'I should like to be with you.' " He said, 'By the bye, Dalzell, there are some papers " 'I would like you to sign; sit down.' At the " same time he dipped a pen into the ink, handed " me the pen, and said, 'Here they are, just sign " 'them; these papers right here,' pointing to a " space left for a signature. I said, 'What are " 'these papers,' still holding the pen in my hand. " 'Oh,' he said, 'Some patent business.' I said, 'I will " 'read them.' I took up one of them; I think there " was about six; glanced over them. I said, 'Oh, no, " 'Mr. Moore, I can't sign these; me and Mr. Dueber " has come to no arrangements thus far.' 'But,' says " he, 'didn't you intend to sign these?' I said, 'No, " 'not until the business was more complete, and some " 'arrangements had been made with regard to compen- " 'sation.' He said, 'Very well,' I then left the office.

" 95 Q. Did you upon this occasion or at any other " time say to Mr. Moore that you would sign those " assignments as soon as the patents were all issued?

" A. I did not.

" 96 Q. Did you have any subsequent conversation " with Moore upon the subject of these assignments; if " so, please state it?

" A. I did on the following day. Meeting Mr.

" Moore as he was leaving the office, and I myself was " about to enter the factory, Mr. Moore said to me, " 'Look here, Dalzell, why don't you sign those " 'papers ?' Said he, 'It will be all the better for you.' " He says, 'You know what the old man is, don't you ?' " I says, 'Yes.' He says, 'He's very much annoyed.' " I said, 'That don't trouble me.' 'Now,' he says, " 'you'd better sign those papers, and let the old man " 'have his way ; he'll see you all right.' I said, 'Yes ; " 'I want something more substantial than that. If " 'these patents are not worth anything to him they are " 'worth considerable to me, and he's got to buy them " 'before he can have them. You can let him under-" 'stand that they are in the market.' With that he " went on his way."

Counsel for Dueber Company introduced in evidence certain letters from Mr. Whitney to Dalzell, produced by Dalzell at his request, and thereupon we put in evidence, among others, two letters from Dalzell to Whitney, dated July 24, 1885, and August 4th, 1885 (Rec., pp. 206, 207), in answer to two of the letters put in evidence by Mr. Dueber's counsel (Rec., Qs. 370, 371, p. 74). It will be remembered the assignments were presented to Dalzell by Mr. Moore for signature in the heat of the summer of 1885, the exact date not being fixed. So these letters were written about the time.

The letter from Mr. Whitney to Dueber enclosing these assignments is dated June 29, 1885 (Rec., p. 246). The first of these letters of Dalzell to Whitney is dated July 10th, 1885 (Rec., p. 206), and in it Dalzell says : " I do not think I can come to Springfield until all my " cases are in, *and my affairs settled concerning them.* I " can then start you on my other cases."

The second letter to Whitney, dated July 24, 1885, is in answer to Whitney's letter of July 11th, 1885 (our Record, p. 371), in which Whitney speaks of having sent these assignments to Dueber, asks Dalzell if Dueber had said anything to him about them, and calling his attention to the clause directing the patents to issue to the Dueber Company.

Dalzell, in answer, says: "I thank you for the hint "you gave me about the clause in the assignment "papers. *I have not come to any understanding with "the firm as yet, but hope to have the thing settled soon, "so that we can go on with the other cases.*"

And, again, August 4th, Dalzell writes (our Record, p. 345): "*Mr. Whitney—The firm have asked me to sign "the papers; they said nothing about compensation, "but I refused. They then said they would come to an "understanding, but have said nothing since about it. "They then said they would do the right thing with me, "but time is rolling on, and they are making thousands "of dollars, and I am making nothing.*"

These three letters are competent evidence, being part of a correspondence offered by the Dueber Company.

They were written by Dalzell before this controversy was dreamed of. They are confidential communications addressed by Dalzell to his counsel, with no thought they would ever be read by other eyes; and, we submit, they show conclusively that Dalzell had no more knowledge of the pretended agreement, now relied upon by the Dueber Company, than Mr. Dueber had when he swore to the Cincinnati bill, and to the plea in bar in case No. 13,814.

Much blame is laid upon Dalzell by counsel for the Dueber Company, because it does not appear that Whitney returned to Dueber the $120 sent him by Dueber to pay the final fees for these patents; but we submit that Dalzell is entirely without fault in that regard. On September 13th, 1885, (Rec., pp. 215, 216), Whitney writes Dalzell he cannot use the $120 sent by Dueber to pay final fees, and for Dalzell to send him money for that purpose. The reason of this is manifest, for Dueber had written Whitney to send the blank forms of assignment, which Whitney had sent June 29th, 1885 (Rec., p. 246). Just what Dueber said to

Whitney in this letter is not known, for Dueber says he has no copy of it (Rec., p. 239, Q. 138), but he says he told him "those patents for which we sent you the final fees are to be assigned to the Dueber Co." So after the receipt of this notice Whitney would not use the money sent by Dueber for final fees, Dalzell having refused to execute the assignments.

Upon the request of Whitney, Dalzell sent the money required (Rec., p. 217), and Dueber's money was not used for that purpose. If Whitney obtained the money from two different sources for this purpose, certainly Dalzell is not to blame.

Whitney appeared once at the taking of testimony in these cases (Rec., p. 16) as of counsel for Dalzell; but that was his last and only appearance on Dalzell's side of the case.

If the Court will examine (Q. 305, Record, p. 65), and (Q. 340, Record, p. 69), it will appear that Mr. Dueber's counsel had more knowledge of transactions that would naturally be only known to Dalzell and Whitney than he could have probably gained without the aid of Whitney.

It is hardly fair, therefore, to blame Dalzell for not calling Whitney to the stand.

Our witness, Mr. Naul, on cross-examination, testifies to a conversation he had with Mr. Moore of the Dueber Company on this subject (Rec., p. 98), which entirely corroborates Dalzell's account of it.

" X-Q. 46. Well, what was said with reference to his
" patents?

" A. I met Mr. Moore on Jefferson street, he say-
" ing, 'I see our friend Dalzell has three patents issued
" 'to him.' I said, 'Yes, I believe so. By the bye, Mr.
" 'Moore, do you know that they have communicated
" 'with him from the American Watch Company con-
" 'cerning those patents?' He saying, 'We don't in-
" 'tend to pay any fancy price for them; he can take
" 'them away with him, as they don't amount to much.'

" X-Q. 47. When did this conversation occur?

" A. To the best of my recollection, that would be
" around September, '85. I could not be certain, but
" it was right after they were issued."

Mr. Moore's denial of this is on page 417 of the record :

" 17 Q. Your attention is called to the 44th, 45th
" and 46th answers of said Naul, and you are asked to
" state what there is of truth in them, and what is un-
" true ?

" A. I remember Mr. Naul stopping me one day on
" my way to dinner, coming out of Mr. Naul's house,
" and coming across the street to where I was. He
" said Dalzell had had some communication from the
" American Watch Company. *I told him that until*
" *Dalzell signed these assignments we should have nothing*
" *to do with him.* The balance of Mr. Naul's state-
" ments, I think, are purely imaginary."

This statement of Mr. Moore's is, we submit, more damaging to their claim than Naul's testimony.

Dalzell, it will be remembered, claims he refused to sign these assignment papers, because no arrangement had been concluded as to the consideration to be paid him, and that the Dueber Company wanted him to sign the papers and trust them to do the right thing afterwards ; while Mr. Dueber and Mr. Moore claims he never refused to sign the papers at all, but gave them to understand he would do so as soon as all the patents were issued (see Moore's answer to Q. 10, Rec., p. 417). Why, then, does Mr. Moore say they will have nothing more to do with Dalzell until he signed the papers ? Is not that rather a harsh position to take towards an employee, who is only waiting until all his patents are issued to turn them over to the Dueber Company *gratis ?* That answer of Mr. Moore's, we submit, has the unmistakable ring of false metal ?

What can he mean "*by having nothing more to do* with Dalzell," if some arrangement was not to be made concerning his compensation ? According to the Dueber Company's claim Dalzell had the patents, which he ought to assign to them without compensation. What more could Dalzell ask, under such circumstances, than that they should have nothing more to do with him ? The fact that Dalzell refused to execute these assignment papers in the summer of 1885, and had the patents issued to himself, and thereafter remained in the employ of the Dueber Company until January 19th, 1886, without any attempt being made by Dueber to compel him to assign them, is a sufficient admission that the patents belonged to Dalzell, and the attempt to explain this away by saying they were waiting because Dalzell didn't want to assign any of the patents until *all were issued* is absurd. The plea in bar alleges with great particularity that the pretended agreement with Dalzell provided that the assignments should be filed with the Commissioner of Patents when the applications for the patents were filed ; but the record discloses no suggestion of an attempt to do so. The issuing of these patents to Dalzell was no secret ; it was published in the Newport papers (Rec., p. 33, Q. 113).

The testimony of Coburn on this subject we do not consider important. He says (Rec., p. 450, Qs. 9, 10 and 11) that about October, 1885, he had a conversation with Dalzell, in which Dalzell told him he intended to have these inventions patented for the benefit of the Dueber Company, but did not tell him he was to receive any compensation for them, excepting his salary and position (Rec., p. 456, x-Q. 57).

The alleged conversation is denied by Dalzell (Rec., p. 169, Qs. 13, 14) ; but, even if it were true, it establishes nothing contrary to Dalzell's claim, for at that time he hoped to come to some understanding with Mr. Dueber as to the compensation to be paid him for his inventions.

This testimony of Coburn's belongs to that class of which Prof. Greenleaf says :

" When we reflect upon the inaccuracy of many wit-
" nesses, in their original comprehension of a conversa-

"tion; their extreme liability to mingle subsequent
"facts and occurrences with the original transactions;
"and the impossibility of recollecting the precise terms
"used by the party or of translating them by exact
"equivalents, we must conclude there is no substan-
"tial reliance upon this class of testimony."

1 Greenleaf on Evidence (Redfield's Ed.), Sec. 200.

And when such testimony comes from a witness such as Coburn, who is not only an employee of the Dueber Company, but also an active partisan in this case, looking up testimony for the Dueber Company, coming from Springfield, Mass., to Elgin, Ill., for that purpose (see Coburn, x-Q. 49, x-Q. 56, p. 455, Rec.), we submit it is entitled to no consideration whatever.

If, as Coburn says, Dalzell was to have his salary and position as the consideration for his inventions, that consideration was never secured to him; for, as we have shown, the Dueber Company was at liberty to decrease his wages or discharge him at any time. The fact that the Dueber Company furnished the money to pay the expenses of obtaining the letters patent is no evidence that Dalzell agreed, in consideration thereof, to assign the patents to it. That fact is perfectly consistent with appellant's claim that no agreement was ever concluded as to the terms on which the Dueber Company should have the patents; but they were gotten out with the expectation, on Dalzell's part, that an agreement, involving compensation to himself, would be made, and with the expectation, on Mr. Dueber's part, that he would succeed in getting an assignment from Dalzell first, and talk about compensation afterwards. The fact that the bookkeeper charged these items into the general expense account is of no significance, for it is not pretended he was informed of any arrangement between Dalzell and Dueber, and he says (Rec., p. 294, Q. 3) he had no instructions on the subject.

The circumstances of paying the first expenses for these patents tend strongly to support Dalzell's statement that the money was advanced to him. The first check given on this account by the Dueber Company was made payable to the order of Dalzell and by him endorsed to Mr. Whitney. Dueber's witness, Mr. Moore, attempts to explain this in his answer to Q. 7 (Rec., p. 416), by saying he had the check made that way, as Whitney was a stranger to him, to protect the Dueber Company.

But it can hardly be believed that Dalzell's name on the check, he being insolvent, would protect the Dueber Company; that Mr. Moore was mean enough to want to hold Dalzell responsible in case the Dueber Company made a mistake in paying its own obligations, especially as Dalzell was giving them the patents.

It is insisted that it is not probable that Mr. Dueber should furnish money for getting out these patents without a clear understanding with Dalzell that his company should have them for nothing. How much less probable, we submit, that Dalzell should suggest and insist on patenting his inventions, and should employ an attorney of his own selection for that purpose, so that he could present them to the Dueber Company, and cut himself off from using them?

" When questions of fact are submitted to a jury for
" determination, their duty is to decide the disputed
" question, and they are controlled by the preponder-
" ance of the evidence and by probabilities; but a court
" of equity, when asked to decree a specific perform-
" ance, may, and should, decline to act where the evi-
" dence leaves the issue in doubt and uncertainty,
" referring the party to his remedy at law."

2 Story's Eq., Sec. 769.
Nickerson vs. Nickerson, 127 U. S., 668.

In the case last cited, the plainaiff and her mother testified to the alleged agreement, which the defendant denied. The agreement was fair and equitable in its nature; but this Court refused specific performance solely on the ground that the proof was not of "that clear and satisfactory character" required to obtain that relief.

"If it be doubtful whether an agreement has been "concluded or is mere negotiation chancery will not "decree a specific performance."

Carr vs. Duval, 14 Pet., 77, p. 83.

"It should never be granted unless the terms of the "agreement sought to be enforced are clearly proved; "nor where it is left in doubt whether the party "against whom relief is asked ever made such an agree-"ment."

Hennessy vs. Woolworth, 128 U. S., 438, p. 442.

The learned Circuit Judge, we submit, overlooked this rule, for he says, in his opinion (Rec., pp. 552, 553).

"The circumstance has not been overlooked that the "terms of the agreement as alleged in the bill depart "somewhat from those alleged in the plea of the com-"plainant to the bill of Dalzell and the Fahys Watch "Case Company, nor have the evasive answers been "overlooked of Dueber himself to some of the questions "which were propounded to him. These matters, as "well as the testimony of the many witnesses for the "defendants tending to corroborate Dalzell's version of "the facts, have been duly considered. The case is one "in which different minds may well reach a contrary "opinion of the merits."

We submit, it is not a slight departure which the bill drawn to meet Mr. Dueber's evidence makes from the plea in bar. In the plea the agreement is averred to have been made before the inventions were discovered, while in the bill it is said to have been made afterwards. The plea avers a consideration to be paid Dalzell, and the bill says nothing was to be paid him. How could there be a greater departure? Or how can a Court determine which of the two inconsistent statements is true?

IV.

No decree should have been rendered against The Fahys Watch Company, affecting its rights to manufacture under the patents in controversy, which were acquired without notice of the Dueber Company's claims.

It appears from the record (p. 540) that by a writing dated January 21st, 1886, and executed on or about January 22d, 1886, the Fahys Company acquired the right to manufacture and sell under these patents, by grant from Dalzell (Rec., p. 540), prior to the receipt of the Dueber circular of February 2d, 1886, which was the first notice given by Dueber of his claims.

The only testimony on the question of notice is that of Mr. Joseph Fahys and Mr. Henry F. Cook, both called by the Dueber Company, and they both testify that The Fahys Company had no notice whatever that the Dueber Company claimed Dalzell's patents until the receipt of Dueber's circular, after the execution of the contract between Dalzell and the Fahys Company, dated January 21, 1886.

The Circuit Court did not find that The Fahys Company had any actual knowledge of the Dueber Company's claims, but held it had constructive notice in that it knew the inventions were being operated in the Dueber Company's shops, and that Dalzell was an employee of that company.

This proposition has never been passed upon by this Court, so far as we can discover, and, we submit, it is erroneous in principle.

The subject matter of letters patent is not the right to practice the invention. That right the inventor has without the letters patent. The subject of the letters patent is the right to exclude others from practicing the invention. Of this right or property the Dueber Company had no possession, nor was the fact that Dueber was using the devices described in these patents a circumstance of suspicion ; for, as Mr. Fahys says, improvements seldom originate with the heads of the house, but with the skilled workmen, and the law secures the patent right for such improvement to the workmen. So, when Dalzell presented the letters patent granted to him for these improvements, there was nothing to notify Mr. Fahys or cause him to suspect that Dalzell was not the true and lawful owner of them.

A case comes to mind, and, doubtless, such cases are familiar to your Honors, where one man claims to be the original and first inventor of a certain improvement pertaining to electric street railroads, and has a clear title of record to letters patent for the same. But, while he was fighting interference cases in the Patent Office, the improvement has gone into general and notorious use throughout the United States. Now, must one desiring a license under these letters patent, inquire of all persons known to be using the invention whether they claim to own the patents referred to ? Would one about to take a license from Mr. Bell under his telephone patents be bound to inquire of all persons known to be practicing the invention whether they claimed to own Mr. Bell's patents ?

The answer is apparent : The licensee could safely rely on the records in the Patent Office, according to the terms of the statute in such case made and provided.

In the case of real estate, there is but one piece of property in existence, to wit, the ground in controversy, and the use and occupation of the ground by one is inconsistent with its use and occupation by another, and is, therefore, the assertion of a claim by the possessor to the property. But the use of a patented apparatus by one is not inconsistent with the use of similar apparatus by others at a different place; hence, it is no assertion of a claim to the right to exclude others from using similar apparatus, and, therefore, is no notice of a claim to own the letters patent. The application of such a principle to the patent laws would, in many cases, make it impracticable to deal with letters patent, and utterly defeat the object of the statute on this subject.

We submit that knowledge that a person is using a patented device, art or process is simply notice that he claims the right to practice the ivention, and, therefore, at most, only constructive notice of his right to do so, and is no notice that he claims the right to exclude all others from so doing, and is not, therefore, constructive notice that he claims the letters patent themselves, which stand of record in the name of another.

It is not pretended that the Fahys Company knew that it was claimed that Dalzell invented these improvements while in Dueber's employ. But, even if it were shown that the Fahys Company knew that Dalzell discovered these inventions while in Dueber's employ, and that Dueber was practicing the inventions, that would not be constructive notice that Dueber claimed the patents themselves; for the employer has no more right to the employee's patents than to any other property of the employee.

The law, we submit, does enough for the employer, when it secures to him the right to practice the invention, without requiring all the world to take notice whether he claims the letters patent which with his knowledge and assent have been duly granted to the employee, and stand of record in his name.

The fact that Mr. Dueber permitted these patents to stand in the name of Dalzell from October 27th, 1885, knowing, as he did, that they had been issued to him,

(Dalzell had possession of the patents before his contract with Fahys Co. Rec. pp. 33, 57, 72.)

was a public admission that the patents belonged to Dalzell, and should preclude him from asserting his claims as against an innocent party acquiring rights thereunder without notice.

Much criticism of Mr. Fahys and Mr. Cook was made by counsel for the Dueber Company, but, we submit, the only adverse comment that can be made upon their actions is that they employed Dalzell without asking Mr. Dueber's permission. If etiquette required this we think that requirement was dispensed with by Mr. Dueber's known habit in this regard (Rec., p. 97, Q. 37).

We submit, since the proof shows the Fahys Company acquired the right to manufacture under these patents in good faith without any notice of the pretended claim of the Dueber Company, a decree was erroneous which found it had no rights whatever in the premises and required it to convey all such claims to the Dueber Company.

Beach on Mod.
Wade on Notice

V.

The material allegations of the plea in bar are disproved or abandoned.

1. DALZELL DISCOVERED THE INVENTIONS IN CONTROVERSY BEFORE ENTERING THE DUEBER COMPANY'S EMPLOY.

We deem it immaterial, under the issues between the parties, whether or not Dalzell invented the improvements in controversy while in Dueber's employ. The Dueber Company's plea in bar avers that these inventions were made under, and in pursuance of, an agreement made when Dalzell's wages were increased, and, in consideration of such increased wages, that Dalzell and is, therefore, the assertion of a claim by the possessor to the property. But the use of a patented apparatus by one is not inconsistent with the use of similar apparatus by others at a different place; hence, it is no assertion of a claim to the right to exclude others from using similar apparatus, and, therefore, is no notice of a claim to own the letters patent. The application of such a principle to the patent laws would, in many cases, make it impracticable to deal with letters patent, and utterly defeat the object of the statute on this subject.

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Beach on Mod. Eq. Jur. sec. 349, 351-
Wade on Notice - sec. 67, 306-

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Now, we submit that plea must be held to set up a single defense, to wit, title to the inventions by virtue of the special contract, and it cannot be given a double aspect by claiming under it an implied license or shop right as a defense to the bill of Dalzell and the Fahys Company. It is conceded no agreement was made at the time, nor upon the consideration averred in the plea, and it must also be conceded that the inventions were perfected and in full operation in Dueber's shops long prior to the increase in Dalzell's wages, and there is no averment of a hiring of his inventive talent prior to such increase. So that every material averment of the plea in bar is not only disproved, but entirely abandoned by the Dueber Company. To what effect does it now claim that Dalzell made these inventions while in its employ and prior to the increase in his wages? Dalzell came to Cincinnati in 1880, was employed for a short time by Fox Bros.; then, from January, 1881, to the Fall of 1882, by Duhme & Company in their watch and jewelry factory; then a short time in the Queen City Sewing Machine Company, and thereafter, about February 1st, 1883, entered the employ of the Dueber Company.

Mr. Dalzell says (x-Q. 127, Rec., p. 34) he first conceived the idea of this method of making watch crowns in the fall of 1880, and did the first work on it at the machine shop of James Robinson, which, it appears (Rec., p. 114, Q. 50), is a machine shop devoted to the manufacture of specialties, dies, presses, etc. After he came to Cincinnati, in 1880, Dalzell became acquainted with Mr. Robinson, and thereafter was accustomed, during 1880, 1881 and 1882, to work, from time to time, in Robinson's shop, using his tools, coming and going as he liked, pursuant to a custom Mr. Robinson had of permitting mechanics out of employment to use his tools when the same were not in use in his shop (Robinson, Qs. 7 to 19, Rec., p. 111, and *Id.*, p. 114, x-Q. 46). Dalzell says he worked on this method of making watch crowns at George Keene's machine shop at his home in Newport, Ky., and, in his spare moments, at the Duhme shop at night, and at the Queen City Sewing Machine shop, and at other shops in Cincinnati, and had succeeded in making watch crowns by this method before he met Mr. Dueber (Rec., p. 18, Qs. 22, 25; *Id.*, p. 34, x-Q. 126 *et seq.*), and that he showed the product to numerous persons, and told them of his ability to produce watch crowns by a new method much cheaper than they were then being manufactured, telling them they were struck up (Dalzell, Rec., pp. 33 *et seq.*, x-Q. 117 *et seq.*). He is corroborated in this statement by numerous witnesses.

Mr. James Robinson tells of Dalzell's habit of working at his shop with his lathe and other tools on work for himself, as above stated, and further says (Rec., p. 111, Q. 19, *et seq.*)., that in 1882, while Dalzell was employed at Duhme's he showed him a corrugated watch crown for which he gave the impression he had invented the machinery. Told him that by his method they could be made a great deal cheaper than by the method then in use, and wanted him to go into the manufacture of them with him.

George Keene (Rec., p. 117) tells of Dalzell's custom of working at his shop on some work he was doing for himself.

Wm. Oliver, an employee of Robinson's, says that Dalzell showed him a corrugated watch crown at Robinson's shop, and told him it was made by dies in an hydraulic press.

Mr. Oliver says (Rec., p. 115):

" 11 Q. What, if anything, did Dalzell tell you as to
" who made this crown he showed you, or about the
" making of it?

" A. Mr. Dalzell had a few of those crowns in his
" hand, and I made the remark that it would be a very
" tedious thing to turn those up in a lathe, and then

" afterwards put in the corrugations in the milling " machine. Then he smiled at me and said they were " not made that way at all, but were made in dies in " hydraulic press. The thing seemed so impossible to " me that it ended the conversation there.

" 12 Q. Did he tell you who made the crowns he " showed you?

" A. He didn't say who made them, but from his " conversation I supposed he made them himself."

Mr. Oliver says this conversation occurred *about* 1880. It was, doubtless, in 1882; for, as Mr. Robinson says, Dalzell frequently worked in his shop during that year (Rec., p. 111, Qs. 14, 15), corroborating Dalzell, who says that while in Duhme's employ he often took half a day off to work on his crown tools (Rec., p. 34, x-Q. 129), and, as Dalzell says, he first produced crowns by his method after he was employed at Duhme's.

Dueber's witness, Louis Noelke, foreman at Duhme's, says (Rec., p. 292, Q. 21; *Id.*, p. 293, Qs. 28, 30) that Dalzell told him that, while at Duhme's, he could make watch crowns with dies, or tools, cheaper than they could be bought (compare Dalzell, x-Q. 160, Rec. p. 39).

Dueber's witness, Louis Noelke, Jr., son of the former, says, (Rec., p. 398, x-Q. 40) that Dalzell told him he could make watch crowns at five cents apiece.

Theodore Cook, spectacle maker at Duhme's, says (Rec., p. 141, Q. 10) Dalzell told him it was unnecessary for the firm of Duhme to buy watch crowns; that he could make them cheaper than they could buy them; that he had a method of making them entirely different from any in use at that time.

Charles Merz, a chain-maker at Duhme's, says (Rec. p. 140):

" 16 x-Q. Did you ever have any conversation with " Dalzell while he worked with Duhme's with reference " to the manufacture of watch crowns, cores and shells, " or the tools for making these?

“ A. Yes, sir.

“ 17 x-Q. Well, what did Dalzell say in these con-
“ versations?

“ A. When Dalzell first came to work at Duhme's—
“ I don't remember how long ago it was—he spoke to me
“ about a crown pusher for a watch-case. He told me
“ that at that time they were paying twenty cents
“ apiece, and he could make them for four cents apiece.
“ That if he had money he would go and make the
“ tools and manufacture them. He wanted to know at
“ the time if I had money to the amount of four hun-
“ dred dollars. He thought then that with the four
“ hundred dollars he and I could go into the manu-
“ facture of crown pushes and make money. But I
“ didn't feel inclined to invest the money, and, in fact,
“ could not spare it to invest. He also told me at the
“ time a certain process for making them. I don't
“ know whether the process was right or not. I will
“ tell you what he told me at the time. His process,
“ as far as I can recollect, was that he was to make a
“ brass core, which goes inside of a gold or silver shell,
“ and the whole thing is put in a press and pressed in
“ a die; each die is made out of three pieces or three
“ parts.

“ 18 x-Q. How was he to make the core?

“ A. If I remember right, he was to make the core on
“ a lathe, by turning it, I suppose.

“ 19 x-Q. Please describe this die as accurately as
“ the information he gave you will enable you to do it,
“ that was to be used to put the shell and core
“ together?

“ A. I only know it was to be a die of three parts.”

This description of Dalzell's method by Mr. Merz, while it is complete, and we claim inaccurate in respect to the core, yet establishes the main feature and charteristic of the invention as described in the letters patent. The use of a die of two parts, to-wit, a die and punch, is old in the manufacture of articles of sheet metal. As shown by the patents, this invention consists in adding a third part to the dies, enabling by the double action of the press, a lateral and vertical pressure to be brought to bear simultaneously upon a solid metallic blank. This feature appears in Merz description, where he says the shell and core is "put in a press and *pressed in a die*; each die is made out of three pieces or three parts."

Dalzell says, in answer to Q. 6 (p. 167, Record), he don't remember a conversation with Merz; that he may have told him the brass cube was cut off with a lathe, as that would be necessary in the absence of dies for the purpose, in order to get a square end; and, as at that time, he had no dies for this purpose, it is highly probable he did so make the brass cubes.

Mr. Merz was acquainted with the manufacture of crowns (see his answer to Q. 1, &c., Rec., pp. 138 and 236), and it is hardly possible he could correctly repeat this description six or seven years after it was given him.

But even if he be correct, that Dalzell at that time made the core on a lathe and then put both core and shell together into a die of three parts and pressed them, it would be but a short step to discover that this die of three parts would best press the core alone, and this conversation occurred when Dalzell first came to Duhme's, in January, 1881, and he was continually working on this invention during the years 1881 and 1882.

Charles Penkawa, who worked at Dueber's while Dalzell was there, and was, when his deposition was taken, working for J. L. Haven & Company, Cincinnati, says, when Dalzell had been at Dueber's about two weeks (Rec., p. 130, x-Q. 70), he visited him at his house, and there Dalzell showed him a shell, a core and a crown—the core was corrugated and the shell was corrugated—and told him they were stamped (Rec., p. 126, Q. 9, *et seq.*). At the time he saw in Dalzell's box tools similar to the models of crown tools made exhibits in this case (Rec., p. 127, Q. 23). Some of them were male and female stuck together, standing perpendicularly in the box (Rec., p. 133, Q. 112). They were not so bright as the crown tools made exhibits (Rec., p. 127, Q. 25). This witness was subjected to the most rigid cross-examination, which only served to establish his reliability.

William Naul says (Rec., pp. 94, 95):

" Q. 6. How long have you known Allen C. Dalzell, " one of the complainants in this suit?

" A. Since about April or May, 1883.

" Q. 7. Did you ever see Mr. Dalzell in the posses- " sion of tools for the making of watch crowns; and, if " so, when and where did you first see them?

" A. I visited Mr. Dalzell's house, 64 Ann street, " Newport, Kentucky, about July or August, 1883; " there he showed me some tools pertaining to crown- " making.

" Q. 8. How did he happen to show them to you on " this occasion?

" A. It was in the course of conversation that we had " at his house concerning the Marion Watch Factory, " where I had been working, and see a crown machine. " I asked him if he knew who made that machine, and " he said, 'I did; but that is old now. I can beat it.' " By that he fetched these tools out, with samples " of crowns, shells and cores, together with other " jewelry samples. I asked him why he did not make " crowns for us, meaning the Dueber firm. He said " Mr. Dueber knew about it, but had not said anything " to him up to the present. I said, 'Shall I speak to " 'the firm?' He said, 'Please yourself.'

" Q. 9. What led you to ask him who made the " crown machine at the Marion Works?

" A. Mr. Dueber had often asked me if ever I had " seen crowns made; I told him that I seen them made " in Marion, and had often asked me if I knew of a " crown-maker.

" 10 Q. What tools for making watch crowns did " Mr. Dalzell show you at his house on this occasion?

" A. Some models. I should think, to the best of " my recollection, about six, together with other tools ; " I can't remember the nature of those.

" 11 Q. Do you remember what these models were " for ?

" A. For making crowns.

" 12 Q. Were all or any of them completed tools to " be used in making crowns ?

" A. There were some, probably two or three, with " corrugates. The rest was blanks.

" 13 Q. Please examine the models now shown you " marked Complainants' Exhibit Dalzell's Models of " Tools, Nos. 1 to 16, respectively, and state how these " models compare in shape and appearance with those " Mr. Dalzell showed you at his house (showing wit- " ness exhibits referred to) ?

" A. Those are like the models he showed to me, " with the exception they look a little brighter, as if " they had been cleaned.

" 14 Q. Upon what part of the model were the cor- " rugates which you say two or three of them had when " he showed them to you ?

" A. I am not acquainted with the tools, but I know " that this is the end that had the corrugates on (point- " ing to the end that carries out partly the shape of a " crown ; the other end being prepared to fit a suitable " machine).

" 15 Q. Were any of the crowns which he showed " you completed ?

" A. Yes ; I believe he showed me about three " crowns completed."

Charles Butts says (Rec., pp. 84, 85) that in 1882, while Dalzell was at Duhme's, he showed him the watch crowns, the tools for making them, and described the processes according to the method in question, and that he also saw the tools at Dalzell's house in Newport, Ky., and at the Dueber factory.

Rudolph Dalzell says (Rec., 103 *et seq.*) that when he came to Newport, he carried some of these tools from his brother Allan's house to the Dueber factory.

Dalzell says he purchased steel for use in making these tools of Stratham & Price, and Mr. Price says (Rec., p. 122, Qs. 11, 12, and *Id.* p. 124, Q. 36) he sold Dalzell at various times best English Jesup steel, round steel, inch and one-half, and other sizes, and this material is what is used in making these crown tools.

Dueber admits (Rec., p. Q.) all crown tools are made by turning them out of bar steel.

Dalzell says he frequently worked at nights at Duhme's, and, while there, used their drop in stamping up some of his dies (see his answer x-Qs. 153, 160, Rec., pp. 38, 39).

Anton Kohl, Duhme's night watchman, corroborates him as to working there at nights, and remembers seeing Dalzell with dies red hot and using the drop-hammer.

Dueber's counsel attempted to break down Mr. Kohl as to Dalzell's use of the drop-hammer (see Rec., pp. 118, 119), and failing in that, he calls Mr. Kohl to testify that Dalzell never used the drop except when Louis Noelke, Jr., was with him ; and then Louis Noelke, Jr., to testify that the dies Dalzell made were for the use of Duhme & Co.

Now, Dalzell was there about two years, in 1881 and 1882, and frequently worked at night. It seems hardly possible that Kohl, who was busy in other parts of the building while Dalzell was at work, can now remember that when Dalzell was alone, without Louis Noelke, Jr., he always worked at his bench. Louis Noelke, Jr., says it is all so long ago, he can't say whether Dalzell made more than these two dies which he says were for Duhme (see his answers to x-Q.s 31, 32, Rec., p. 398) ; and Anton Kohl, when called by us, could not remember whether Dalzell used the drop once or twice, or how many times he did use it (see his answers to x-Q.s 35, 37, Rec., p. 120).

So that we hardly think the imperfect recollections of these two witnesses can be claimed to overthrow Dalzell's statement that he used the Duhme drop in experimenting on crown work, considering how easy it would have been for him to do so, and the fact otherwise clearly established that this time the subject of making watch crowns occupied a prominent and foremost position in his mind.

Dalzell says he made watch crowns with these tools, at his home in Newport, with the aid of a hammer, a stake and a well-developed muscle.

Counsel for Dueber Company contradicted that statement by the testimony of his pretended experts, Mr. Piper (Rec., pp. 304, 305, Qs. 66, 69), and Mr. Bradley (Qs. 55, 56, *Id.*, pp. 353, 354), both of whom testify that it would be impossible to make a watch crown by hand. Our answer to that was to have Mr. Dalzell produce the tools at the taking of testimony before Mary F. Seymour, in the Potter Building, New York, and there on his knees on the floor, with a little piece of casting two inches high for an anvil, with a hammer, make a watch crown by hand (see Rec., p. 166, Q. 5 *et seq.*, and Dalzell Ex. Hand Made Crown, etc.).

It is true that, after producing one shell, he broke the punch for corrugating the shell, but these shell tools, the testimony shows, are very delicate and frequently break in the presses (see Pfeifer, Qs. 28, 29, Rec., p. 182). Dalzell explains the mishap by the awkward position in which he was working.

Dalzell also says (Rec., pp. 42, 43) he purchased part of a milling attachment of a machinist by name of Conway in the Carlisle building, portions of which he used and left in the Duhme shop, and Louis Noelke, Jr., says (Rec., p. 398, Q. 42) Dalzell sold two small cutters to the foreman of Duhme's shop, which are there yet.

Now, reviewing this mass of testimony of James Robinson, George Keene, William Oliver, Louis Noelke, Louis Noelke, Jr., Theodore Cook, Charles Merz, Charles Penkawa, Wm. Naul, Charles Butts, Rudolph

Dalzell, Henry Price and Louis Noelke, Jr., again, we find that, prior to meeting Mr. Dueber, Dalzell was frequently working in Keene's shep and Robinson's shop with machinery adapted to making these crown tools. That he was purchasing material suitable for the same use ; that he purchased cutting apparatus suitable for cutting the corrugates in them, and was showing watch crowns, cores and shells and claiming to numerous persons that he had a method of making them different and cheaper than any then known, by stamping them in presses ; wanting to prove it to Duhme, wanting Robinson to go into the business of making them ; and then, upon the first opportunity that was offered introducing that very method in the shops of Dueber.

The thing which Dalzell said in 1882 he could do, that very thing he did. Counsel for appellants attempt to discredit this testimony. They suggest that this was simply Dalzell's bragging nature, that he stole the few crowns he showed to these people, and that he never thought of making watch crowns until he went to Dueber's.

A strange fatality, we submit, that his bragging should be confined to watch crowns, and that he should want to prove himself a braggart and a liar by trying to introduce his method at Duhme's, or by getting James Robinson to go into the business of manufacturing these crowns with him. And stranger still, we submit, that sudden and unaccountable modesty that came over him when he sought employment at Deuber's and entered the Dueber shop ; for Mr. Dueber and his foreman and witness, Mr. Piper, both strenuously deny that Dalzell either showed them a watch crown, or pretended to have any ideas on that subject (Dueber Rec., p. 229, Qs. 35, 37 ; Paper Rec., p. 290, Q. 10, *et seq.*).

2. DALZELL ENTERS THE DUEBER COMPANY'S EMPLOY.

Now in January, or first of February, 1883, Dalzell enters Dueber's employ, and here the conflict of testimony begins, some of the disputes having a remote bearing upon the question when these inventions were discovered, but most of them having none.

There is a great dispute as to who hired Dalzell to work at Dueber's, and what he did when he first went there. Dalzell says Mr. Dueber hired him as a plater and gilder. That he was in the tool room of Factory B waiting for the dynamo and electrical appliances to arrive for gilding and plating, that he was not then under the instructions of Piper, the foreman, but worked at various tools to be used in connection with his gilding and plating, and made some shell tools for a watch-pusher, but that he did no work on crown tools under Mr. Piper, and did not receive any instructions or suggestions from Mr. Piper on that subject. Mr. Dueber says, in answer to Q. 35 (Rec., p. 229), that he hired Dalzell, but he says he hired him to work on crown tools, though in his following answers he says he did not know that Dalzell had any experience about them, and that Dalzell made no representations that he had.

The circumstances strongly support Dalzell in his claim that he was hired as an electro-plater and gilder, for it appears (Dueber's answer to Q. 41, Rec., p. 326) that the dynamo and electrical appliances for gilding were ordered before Dalzell came there to work, and that so soon as they arrived Dalzell was placed in charge of that department, and continued in charge of it until he turned it over to his brother.

Mr. Dueber says that Dalzell does not tell the truth when he said he fitted up this room (see his answer to Q. 26, p. 325, Rec.), but that Mr. Piper and others fitted it up with the aid of a book of instructions, and that Dalzell is untruthful again when he says he established a laboratory there. That there is no laboratory in his shops, and there is no place there called by the name of laboratory (see his answer to x-Q. 174, p. 340). But his witness, C. E. Stricker, says, (Rec., pp. 370, Q.s 20, 22), he was with Dalzell when Dalzell fitted up the room by this book of instructions, and in answer to Q. 30 *et seq.* (*id.*, p. 371), he speaks with great detail of the laboratory in Dueber's factory fitted up by Dalzell.

On the other hand, Mr. Piper says he hired Dalzell himself, and that he was under instructions in factory B, and that he set him to work upon crown tools. That he had had a man by name of Bradley, working on an original method of making watch crowns. That he had the same well advanced when Delzell came, and that he explained his method to Dalzell and had him take the work up where Bradley left off.

Mr. Piper describes this method that Bradley was working on (Rec. pp. 315, 316).

" Cr. Q. 157 Was Mr. Bradley at work on tools that
" were known and in use in the trade, or on something
" new in that line?

" A. I don't comprehend the intent of the ques-
" tion.

" Cr. Q. 158 I mean was Bradley making tools like
" what were known and used in making watch crowns
" prior to that time, or were they to be something new
" in the way of tools for making watch crowns?

" A. The method by which I intended to make
" crowns was entirely original and new, to the best of
" my belief, and it was upon tools to conform to those
" methods upon which Mr. Bradley was working.

" Cr. Q. 159 Will you please explain fully that
" method, and wherein it differed from the then known
" method of making watch crowns?

" A. With my method I made the shell without be-
" ing corrugated. I made the core with a conical
" superfluity of metal on its top to be driven down into
" the shell, thereby expanding it to such an extent

" that it would fill out the corrugations of the dies in " which it was struck up, said dies being made in two " parts, coming together upon the equator of the " crown. The old process, the shell is made and cor- " rugated before the core is put in, after which the core " is put into it and the shell closed around the core.

" Cr-Q. 160. Please explain in detail each step of " your method for making the core ?

" A. The cores that were made in our experiments " were turned, but the experiment never was perfected, " and they were turned in order to determine the pro- " per amount of metal to put into them, allowing for " this superfluity for expanding the shell. By my " method the cores were turned on the end of a brass " rod, which was a temporary method.

" Cr-Q. 161. Did you have any permanent method " of making the cores ?

" A. I had a permanent method which I had in view, " which I think I explained to Mr. Bradley, and also " to Mr. Dalzell.

" Cr-Q. 162. Give us in detail the various processes " in making the core by this method which you say you " had in view ?

" A. It didn't differ much from the temporary method, " except as to after finding the proper amount of stock " I intended to make a shaping tool that would turn " them their proper size and shape and cut them off at " the same time.

" Cr-Q. 163. Give us in detail the various steps or " processes of putting the shell upon the core by your " method ?

" A. When the shell was ready to receive the core, " the core was dropped into it, and the shell closed " around it by means of a closing die.

" Cr-Q. 164. Of how many processes, or steps, did " this operation consist ?

" A. One.

" Cr-Q. 165. What steps or processes was the shell

" subjected to by your method before it was ready to " receive the core?

" A. It was cut and partially cupped up in the " double-action press. Then the cupping was finished " by another operation of a single-action press or drop- " hammer making two operations in all."

Bradley confirms him (Rec., p. 350, Q. 15.)

Now, keeping in mind the method that Piper and Bradley say they were pursuing in their crown-work, let us take a look at what they say they did under that method. Mr. Bradley says (Rec., p. 349):

" Q. 8. Prior to Dalzell's coming to the Dueber Com- " pany, state what had been done, if anything, toward " making crowns or crown tools?

" A. I had built a milling fixture for milling the " corrugations in the masterforces for making crown " dies. I had also cut masterforces with this fixture, " had struck two dies with said masterforces, made " cutting and drawing tools for making crown shells, " had made the shells, made dies and punches for clos- " ing shell over blank core, but never used the dies to " corrugate any shells with. That is far as I had got " when Dalzell came to work.

" Q. 9. Why did you quit, if you did quit, working " upon that object at that time?

" A. I was the only diemaker employed by them at " that time to make their black dies; in fact, all the " dies used in making watch cases. The crown busi- " ness I took up at odd moments I had from my regular " work. At the time Dalzell came there I had enough " case dies to make to keep me busy continually.

" 10 Q. As this milling machine was, when com- " pleted by you, was it adapted to cutting from one or " two centres?

" A. When I finished the milling fixture, I found " that we could only cut from one centre with it.

" 11 Q. Was it subsequently changed in this re- " spect; if so, when and by whom?

" A. It was changed shortly after I tried it, and

" another slide put on the same machine by a man by " the name of Krug.

" 12 Q. In answer 8 you say that you had cut " master-forces with that fixture ; were these cut before " or after it was adapted to cut from two centres?

" A. I cut one when it was adapted to cut from one " centre, and one after it had been changed to cut from " two centres.

" 13 Q. The dies referred to in answer 8, were they " made by the master-force cut from one centre, or the " one cut from two centres?

" A. The dies were struck with the master-force cut " from two centres."

Mr. Piper says (Rec., pp. 301 *et seq.*) :

" 38 Q. Prior to Dalzell's employment, what, if any" thing, had been done toward making crowns or crown " tools at the Dueber manufactory, so far as you " know ?

" A. I think fully a year previous to that I started " Mr. Bradley making tools for crowns. The business " was growing so fast and we were so cramped for " room that I wasn't able to keep him on it but short " periods at a time. They were quite well advanced " when I employed Mr. Dalzell. I then had him take " it up where Mr. Bradley left off.

" 39 Q. Were any masterforces or hubs for the strik" ing the dies for crown-shells made under your direc" tion prior to the employment of Dalzell, and who " made them ?

" A. Yes. Mr. Bradley.

" 40 Q. State by what sort of machine these forces " were cut, and who prepared that machine.

" (Question objected to on the ground that it assumes " that these forces were cut, and that they were cut by " a machine.

" A. It was an index milling machine made espe" cially for the purpose. It was made by a man by the " name of Krug from drawings made by myself.

" 41 Q. Was this machine adapted to cut from two " centres?

" A. It was.

" 42 Q. Did Dalzell use this machine after he went " to work at the crown tools?

" A. He did.

" 43 Q. Did Dalzell do anything to this milling " machine other than as you have stated, viz., in your " thirtieth answer: 'I had him put a bracket and screw " 'to lower and elevate the slide.' If so, what further?

" A. He did. I found that Mr. Krug had made the " taper too abrupt, and had Mr. Dalzell change it to a " taper of less degree. The original taper being so " abrupt that it was almost a releasing taper; I had it " changed so it would hold better.

" 44 Q. Was it done while Dalzell was in Factory B?

" A. It was not."

And again, on page 499, he says:

" 7 Q. With relation to the time of Dalzell's coming " to work in Factory B, of the Dueber works, please state " when the Krug milling machine was completed?

" A. This was five years ago; and the best of my " recollection is, it was the spring of 1883. I am mis- " taken there. The last of the year of 1882.

" 8 Q. Please state whether or not there were any " tools, and what, made with that machine before Dalzell " saw it, and who made those tools?

" Objected to, as the witness has already testified as " to this.

" A. I think there was a brass force and a steel force " cut upon the same machine, and it might have been " just before or just after Mr. Dalzell coming there.

" 9 Q. What was done, if anything, with this steel " force?

" A. There had been previously dies made for cutting " and drawing the shell suitable for this force, and " afterwards there was a shell struck up from the same " force."

A comparison of the alleged work with the pretended method will convince your Honors that this testimony of Bradley and Piper is an ill-devised fable, gotten up for the purposes of this case, and false on its face.

1. The method was to force a brass core with a conical superfluity of metal on its top into a plain or corrugated shell by means of corrugated dies coming together on the equator of the crown, and thus corrugate both shell and crown together. The dies made for this purpose were all made from one force, for Bradley says (Qs. 12, 13, quoted *supra*) he only cut one force with which he struck up the die. They would, therefore, produce a crown with two heads and no stem, or two stems and no head.

2. Bradley says these dies were not used to strike up any shells with. Piper says (Q. 9, quoted *supra*) a shell was struck up with this same force. How could a shell be struck up with the same force which made the dies? There must be some room for the shell between the die and the force!

3. If it be true that Bradley and Piper were pursuing a method calling for plain shells to be corrugated after the core was inserted by a pair of dies coming together *on the equator of the crown, why should they be making corrugated dies for striking up the shell, or be striking* up shells with a corrugated force?

4. The pretended method set forth by Mr. Piper is absurd on its face. No mechanic would entertain it for an instant. A brass core with a conical superfluity of metal on its top to be driven into a gold shell by a pair of dies coming together on its equator with such force as to cause this superfluity of brass to *fill out* the corrugations of the dies. What would become of the gold shell? Gold is much softer than brass, and it is certain the dies would cut through and destroy the shell before making any impression on the brass core.

Numerous other glaring inconsistencies appear in this testimony of Bradley's and Piper's; for instance, they say Dalzell took up this work where Bradley left off. Can any one tell where Bradley left off? Yet they say the first work Dalzell did was to make tools for cutting and drawing the shells; the very tools which Piper (Q. 9 *supra*) and Bradley (Q. 8 *supra*), both say had already been made by Bradley.

It will be obserued there was nothing new about these cutting and drawing tools for the shell. They were used in the old familiar method.

The purpose of this incredible statement manifest by Piper's answer to the remarkable question following (Rec., p. 320):

" Re-Q. 206. After listening to your testimony with " reference to your mode of making crowns, and the " the mode actually pursued subsequently by Dalzell, " my understanding is that these two differ as follows: " That, while Dalzell corrugated core and shell by " separate operations, before the shell was covered " over the core, that in your method, in which you in- " structed Dalzell, there was one less operation, if not " two, and that the corrugating of core and shell was " done at one operation, which operation also inclnded " the securing of the shell to the core, but that other- " wise there was no difference of note between the two " systems. Am I right about this?

" Objected to as leading.

" A. You are right, with the exception that my " method saves two operations instead of one."

This alleged method of Piper's, then, is claimed to furnish all the essentials of the inventions in controversy. Yet it is an utter stranger to those methods compared with the method Charles Merz says (Rec., p. 140, x-Q. 17) Dalzell explained to him early in his employment at Duhme's; for in that method the *die of three parts* appears, which is the distinguishing feature of the method in controversy. The letters patent (Rec.,

p. 526) say: "The dies (illustrated in figures 2 and 3) for carrying out the first step of the method (making the core) consist of the upper die or half A, the lower die or half B, and the male centre die C."

Yet counsel for Dueber claim the method described by Merz has no significance.

If your Honors will read the testimony of Mr. Piper carefully, we think the conclusion will be reached that it was not solely his love of the truth that induced him to leave his shop at Newark, N. J., in the busy season and travel to Cincinnati for the purpose of giving a deposition in this case.

It is a strange circumstance that Bradley (Rec., p. 350, Q. 18) undertakes to tell everything Dalzell did during this six weeks he was in Factory B waiting for the gilding apparatus to arrive; for (Rec., p. 349, Qs. 6, 7) he says he was "not particularly interested in the man," and thinks Dalzell came there in January, 1884, and was only at Dueber's about three months before he left in March, 1884, whereas the fact is Dalzell had then been there over a year! (Rec., pp. 318, 319.)

Mr. Krug, though employed at Dueber's was called as a witness for appellants. His testimony is found on pages 188 to 192, of the record; and, we trust, will be read by the Court.

He contradicts Bradley and Piper completely. He says he did no work whatever on Bradley's milling machine. That the only work Bradley did with it was to cut a brass plug on it. That the milling machine he built was not used by Bradley at all. That the milling machine was not finished by him; he completed it as far as the drawings showed, and that Dalzell was at Dueber's making pliers to be used in the plating department while he was working on milling fixtures, and that there was never anything said about making crown tools; it was called the crown-milling fixture.

[It appears (Rec., p. 499, Q. 2, and *Id.*, p. 170, Q. 20) that Dueber made some solid gold crowns for use on embossed cases, and we think it apparent this fixture was for milling those.]

Piper, to show his authority over Dalzell, and that he was working on crown tools under his instructions, says (Rec., 301, Q. 43) he had Dalzell change the taper of this Krug milling machine, making it less abrupt; but then in the succeeding questions he backs out of it and admits it was not done until after Dalzell left Factory B (Rec., 301, Q. 44), and he says (Rec., p. 312, x-Q. 126*a*) he had no supervision over Dalzell after he left Factory B, and (Rec., p. 302, Q. 47) he says he is not certain whether Dalzell or one of the men under him did this work. As will be shown shortly, Dalzell had no men under him until late in 1884, after his method was in operation in Dueber's factory. Dalzell says he hunted up this milling fixture when he went to work on crown tools in Factory A after he left the gilding department, and with Mr. Dueber's permission it was sent to Factory B and there altered by Butts to fit the taper of Dalzell's tools (Rec., p. 51, x-Q. 233). Butts worked at Dueber's in 1881 first; then again in Piper's department from September, 1883, until April, 1884, when he left again, returning September, 1884, and leaving again December, 1885 (Rec., p. 83). Butts says (Q. 29, Rec., p. 84) he altered this milling fixture to fit Dalzell's tools during his second employment at Dueber's, which began September, 1883 (Rec., p. 89, x-Q. 73), and that it was not finished when in his hands at this time (*Id.*, x-Q. 74), corroborating Krug and Dalzell. Considering the lack of adherence in the story told by Piper and Bradley, we submit the testimony of Krug should be taken as the true version of the matter.

We trust his deposition, which is quite short (Rec., pp. 188, 192), will be read.

It shows he was examined by Mr. Dueber and his counsel in the private office, for the purpose of using him to support Bradley and Piper; but after that examination, the record shows they failed to call him to the stand. It is with ill grace, we submit, that they now come forward and claim his statements to them on that preliminary examination were favorable. After giving this deposition, it seems Krug found in convenient to resign his position with Dueber (Rec., p. 514, x-Q. 25). Yet counsel ask why we don't produce witnesses from Dueber's shops!

The circumstance of altering this taper in the milling fixture shows conclusively Dalzell was not continuing on tools begun by Bradley.

Mr. Dueber, also, corroborates Dalzell in his denial of the story of Bradley and Piper; for he says (Rec. p. 224, Q. 8) he first knew of Dalzell's working on crown tools when he began in Factory A in the spring of 1884. It won't do to claim this, because Mr. Dueber didn't know what was going on in the factory; for he says (Rec., p. 321, Q. 3) he makes the rounds of all departments daily and watches and keeps posted on what the various men in the factory are doing; and Piper says (Rec., p. 309, Q. 91) nothing in the way of work going on in the factory ever escaped Dueber. It is incredible, then, that Dalzell could have superseded Bradley in the special and alleged novel work he was doing, and Dueber never knew it.

The controversy in the record between Dalzell and Piper as to whether Dalzell was under Piper's instructions in Factory B is unimportant--a mere matter of personal jealousy.

3. Dalzell Starts to Work Alone in Factory A, After Leaving the Gilding Department.

Bearing in mind that Dalzell, about six weeks after entering Dueber's employ, took charge of the gilding department and remained there engaged wholly in that work until his brother Rudolph came about November, 1883, we desire to show your Honors, from the course of events in the Dueber shop from that time, that Dalzell must have discovered the inventions in controversy before he entered Dueber's employ.

Dalzell says (Rec., 20, Q. 40) the employment of his brother was the outgrowth of a conversation between him and Mr. Dueber and himself, in which it was arranged that Dalzell's brother should come and take charge of the gilding department, so that Dalzell could go to work to produce crowns by his method. Mr. Dueber being doubtful of his ability to make them as cheaply as he said he could; and (Rec., p. 23, Q. 59), that his work was to be carried on without instructions from any one in the factory but himself.

Mr. Dueber says Dalzell does not tell the truth when he says he worked under no one's instructions in Factory A, and that he was under the instructions of Mr. Piper, foreman of the tool department in Factory B, and afterwards under the instructions of Mr. McLaughlin, Mr. Piper's successor (see Duber, Ans. to Qs. 14, 15 and 16, Rec., p. 225). But Mr. Piper says (ans. to x-Q. 126 A, Rec., p. 312) that he did not superintend him after he left Factory B. Mr. McLaughlin says (ans. to Qs. 8, 9, 10, on p. 154, Rec. and ans. to x-Qs. 55 and 56, p. 157) that he had no supervision over Dalzell and gave him no instructions, but that Dalzell had entire charge of his department, and Dueber's witness, C. E. Stricker, the boy who was with Dalzell in the plating department and came with him to the crown department, says (ans. to x-Q. 152, p. 380, Rec.) that nobody instructed Dalzell in Factory A.

Dueber's witness, George Cook, says (Rec., p. 392, Q. 64) nobody had supervision over Dalzell in Factory A, excepting Mr. Dueber. "He was working for Mr. Dueber."

This dispute between Mr. Dalzell and Mr. Dueber is of the utmost importance, for Dalzell claims he went to work as a sort of confidential man for Mr. Dueber as a result of his claiming that he could produce watch crowns cheaper than they could be bought, and to satisfy Mr. Dueber he could do so; while Mr. Dueber attempts to show that Dalzell sustained no special relations to him and enjoyed no special privileges, but received his orders from the foreman like every other ordinary workman.

The testimony shows the truth of Dalzell's statements and the falsity of Dueber's. What is the explanation of the fact that Dalzell, who had only been at Dueber's about a year, and concerning whom Dueber says (Rec., p. 329, Q. 68) there was no new idea in anything he ever did, was at this time selected to work as a privileged character, subject to no one's instructions but Mr. Dueber's?

The next important conflict between them is as to the length of time it took Dalzell to produce crowns by his method.

Dalzell claims that from the time his brother came to Dueber's in November, 1883, until the summer of 1884, when crowns were being produced in quantities by his method at Dueber's, he instructed Rudolph in the gilding department, and without assistance made dies and tools for plated pendants, bows, nibs, and fitted up the machinery at Dueber's for use in crown making, repaired some of his crown tools, replaced others that were broken, adapted them to the machinery in which they were to be used and produced crowns in quantities by his method.

Mr. Dueber, realizing that the amount Dalzell accomplished in those six or eight months would be convincing proof that he understood the method and had, at least, some of the tools for crown making before he began to work in Factory A, contradicts Dalzell with the usual positiveness.

Mr. Dueber says (Rec., p. 332):

"Q. 88. I want you to state, as nearly as you can, the
" date when he went to work at the crown tools in
" factory A.

" A. About January, the first part of '84.

" Q. 89. How long did he work at the crown tools

" before he was ready to make crowns for use on your " watches?

" A. He made one set of tools in about six months, " I think, and all sizes in about a year.

" Q. 90. Did he do anything else of any consequence, " during this year, than make crown tools?

" A. No, sir; except making one or two cutting dies " for a silver rim.

" Q. 91. How much of his time would the making of " these dies occupy?

" A. Two weeks, one man.

" Q. 92. During this year that he worked upon crown " tools, how many, if any, men did he have to assist " him?

" A. He had one or two men; and, the latter part, " three tool-makers.

" Q. 93. Do you wish to be understood as saying " that Dalzell, with the assistance of two or three men, " worked substantially a year in factory A at crown " tools before he was ready to make crowns for your " cases?

" Objected to as leading.

" A. No; before he was ready to make one size, that " is, about six months, and before he made all sizes it " was about a year.

" Q. 94. But you wish to be understood that Dalzell, " in addition to the time that he worked upon crown " tools, if he did do so, in factory B, worked substan- " tially six months, aided by two men, in factory A, " before he was ready to make crowns for your cases of " one size?

" A. Yes, sir."

Now, let us look at the testimony of the other witnesses on this point.

The men who worked under Dalzell in Dueber's factory were Butts, Critchley and Pfeifer (Dalzell A. 61, Rec., p. 23; Dueber A. 102, Rec., p. 235, and A.

136, Rec., p. 238; Piper, A. 48, Rec., p. 302, Annie Yockey, A. 80, Rec., p. 147).

The first of these to come was Butts, and the second Critchley (Dalzell, A. 61, Rec., p. 23; Yockey, As. 44 and 47, Rec., p. 144).

Butts came to work for Dalzell about September, 1884 (Butts, A. 9–13, Rec., p. 83); and Critchley came about January 28th, 1885 (Critchley, Qs. 3, 4, Rec., p. 483).

Dueber's witness C. E. Stricker, a boy who was with Dalzell in the gilding department, and went with him into the crown department (see Stricker, Qs. 75, 76, Rec., p. 375), and who left the employ of Dueber in May, 1884 (*Id.*, x-Q. 24, p. 502), says, in his answer to x-Q. 27 (same page), that so long as he was there Dalzell had no one to assist him on tools in Factory A.

Duber's witness John Price entered Dueber's employ in the crown department August 12, 1884 (Price, Q. 2, Rec., p. 515), before Butts came, and he says (*Id.*, 23) the first work he did there was cutting brass wire for cores, and (x-Q. 87, p. 424) that they were then making one size crown and (x-Q. 33, *Id.*, p. 518) that nobody was assisting Dalzell. Our witness Wm. Naul says (Qs. 16, 19, Rec., p. 95) that Dalzell worked alone in Factory A about six months.

Our witness Annie Yockey, a girl who worked on the presses under Dalzell, says (Qs. 44, 73, *Id.*, pp. 144 and 146) that she was closing crowns for Dalzell before Butts, Critchley or Pfeifer came to work, and Butts says (x-Q. 85, *Id.*, p. 90) crowns were made at Dueber's in the summer of 1884, while he was down East.

Pfeifer came to work in October, 1885 (Pfeifer Q. 2, *Id.*, p. 180), and never worked on crown tools at all (*Id.*, Q. 3, and x-Qs. 62, 63, p. 185). And Dueber's witness Henry Stech, who entered the crown department July 9 (Stech, Qs. 2 to 7; Rec., p. 400), found them making crowns for one-size case (Qs. 7a to 9, same page). Stech is not positive as to the year, but it was when they were making one-size crown, and before they made the second size, so it must have been in 1884. So, then, Mr. Dalzell speaks the truth when he says that without assistance, between November, 1883, and the summer of 1884, he instructed his brother in the plating department (compare testimony of Dueber's witness Henry Delinering answer to x-Q. 25, Rec., p. 367, who says Dalzell spent two or three hours a day with his brother in the plating department for six months or more). Made the tools for the pendants, nibs and bows, &c. (see Dueber's answer to Qs. 63, 64, Rec., p. 329, and answer to Q. 90, p. 332; Dueber's witness Stricker x-Qs. 139, 140, *Id.*, p. 380; Charles Penkawa, Qs. 28, 29, p. 127, Rec.; Annie Yockey, Qs. 8-10, *Id.*, p. 142), and produced crowns by the method in controversy.

Penkawa says, in the answer last referred to, that before Dalzell came to Dueber they turned these pendants out of a solid piece and bored them, and that Dalzell dropped them in a press.

Annie Yockey says, in answer 10, above quoted, that when she went there (March 11th, 1884), Dalzell was working on tools for the third size pendants.

In view of this mass of testimony, uncontradicted save by Dueber, what can it mean that Dueber swears so positively it took Dalzell six months, with the assistance of two men, to make tools for one size watch crowns?

Can it be simply lack of memory in the man who keeps so thoroughly posted on all that goes on in his factory, or is it not the same guilty knowledge which caused him to deny the peculiar and significant arrangement under which Dalzell started to work for him in Factory A?

Now, search the record as carefully as we may, we cannot find a whimper from the Dueber shop of Dalzell's having made a single unsuccessful attempt at making crowns or crown tools. There is no testimony of any step in the wrong direction, of an impracticable or abandoned idea about the method pursued. We hear nothing of Dalzell's attempting to force a brass core into a plain gold shell with such violence as to fill up the corrugations of the die. Mr. Dueber was in daily conversations with him about his work, and "nothing ever escapes him," yet Mr. Dueber furnishes no testimony to such effect. Cook (Qs. 13-17, *Id.*, p. 388) tells of his breaking some forces in striking up the dies, and claiming it was because the steel was too hard, but that would be a very natural and probable occurrence in replacing his own worn-out tools. Mr. Henry F. Cook speaks of the same thing (Rec., x-Q. 20, p. 161), referring to the work in the Fahys Company's shop, and Mr. Cook also tells us (on p. 159, Q.s 2-9) that it took Critchley and Pfeiffer six months, working continually, to get ready to produce watch crowns in the Fahys shop.

So that instead of its taking Dalzell, with the assistance of two men, substantially six months to make the tools for one size crown in the Dueber factory, as Mr. Dueber would have us believe, Dalzell alone in about six months instructed Rudolph in the gilding department, made the tools for the three sizes of pendants, the pendant bows, the nibs, the dies for the silver rims (see Dueber, Q. 90, p. 332), kept the tools in order, presumably, and superintended the boys and girls at the presses, seeing that the work was gotten out right, and produced crowns in quantities prior to July 9, 1884.

The testimony further shows that after the presses were all fitted up and the use of these new tools in the presses was thoroughly familar, and crowns had been produced in quantities about July 1st 1884, it was about six months before the tools were ready to make the other sizes, and this, although Butts came to work under Dalzell, about September, 1884.

Price, Rec., p. 516, Q. 14.
Dueber, Rec., p. 332, Q. 94.
George Cook, Rec., p. 388, Q. 12.

This testimony is confirmed by the testimony of Mr. Cook of the Fahys Company, that it took Butt and Critchley substantially six months to produce crowns in the Fahys factory (Rec., p. 159, Qs. 2–9).

In addition to the amount of work accomplished by Dalzell, the course of the work indubitably establishes that Dalzell understood the method and had tools before he entered Dueber's shops.

Annie Yockey, who came to Dueber's March 11th, 1884, found Dalzell working on the third size pendant tools. She says (Rec., p. 142, Q. 17), about three weeks after she came, she cut the brass cubes ready to be made into cores; then she had to wait some time before the die was ready for her to use it in making the cores. It does not appear what was to be done to the core-forging tools before they were ready for her to use; but evidently Dalzell was not inventing them. The cutting of the brass cubes in quantities is conclusive proof that the method of manufacture was known and settled.

It is manifest that, as Dalzell says, he was adapting the tools to be used in the new machinery; for it must be remembered these tools had never before been used to produce crowns in quantities, or as an article of merchandise.

This important testimony of Annie Yockey's is attempted to be destroyed by having John Price testify (Rec., pp. 515, 516, Qs. 2–9) that he entered the Dueber shops August 12th, 1884, and that he was the first one to turn out crowns under Dalzell. But they forgot to attend to the testimony of their witness Henry Stech (Rec., p. 400, Qs. 6 *et seq.*), who says when he went there, July 9th, 1884, they were making crowns; and they also forgot that John Price, in his former testimony (Rec., p. 424, x-Q. 87), said when he came to Dueber's they were making crowns of one size as near as he could recollect.

It is interesting to note John Price's improved memory about the date of his employment at Dueber's on the occasion of his second appearance (compare Rec., p. 418, Q. 4).

When we consider that so soon as the success of this method of manufacture was thoroughly established, Butts, Critchley and Pfeifer were employed and placed under Dalzell's control to make and keep in repair the tools for this department, it is simply impossible to believe that Dalzall theretofore did this work by himself and also invented the devices covered by the patents in this case; and the mind of the inquirer at once reverts to the testimony of Robinson, Oliver, Merz, Cook, Penkawa, Butts, Naul and Rudolph Dalzell, that Dalzell had discovered this method and made tools sufficient to test the correctness of his ideas before he ever saw Dueber.

Dalzell says (Rec., pp. 22, 23, Qs. 55, 56, 58): "When he first went to work in Factory A, after leaving the gilding department, he had the taper of the milling machine altered to suit his tools, and replaced such of his tools as were worn out, or broken, and made some few crowns to determine what machinery was suitable to use the tools in; then laid aside the crown work and put in his time making tools for the pendants, etc., until the new machinery should arrive which had been ordered for the work.

He is unquestionably affirmed in this statement.

It will be remembered Butts entered Dueber's employ for the second time in September, 1883, and left April, 1884, returning to work under Dalzell about September, 1884 (Rec., p. 83), and Butts altered this milling attachment for Dalzell shortly after he began work at Dueber's in September, 1883.

Now, when Annie Yockey came in March, 1884, Dalzell was working on the pendant tools.

Dueber says (Rec., p. 343, x-Q. 212), in the spring of 1884, he began ordering new presses for crown work; and Annie Yockie says after she was there about three weeks, she went to work cutting brass cubes to make cores with, and a few weeks later she made the cores out of these brass cubes. Are your Honors to believe Mr. Dueber would order new machinery for Dalzell to make watch-crowns with, before he knew whether Dalzell could make watch-crowns?

Dueber says (Rec., p. 343, x-Qs 210, *et seq.*), he ordered a double action press in 1881, to be used in making watch-crowns, and (Rec., p. 227, Q. 26) he says the work on "them tools" in Factory B was stopped for lack of room to put up the presses.

Do your Honors believe Dueber would order a press he didn't have room to put up? Do your Honors believe he would order a new double-action press for Piper to make crowns with under his method before it was determined whether crowns could be made by that method? Do your Honors believe Piper and Bradley stopped *experimenting* on *their* method because there was no room to put up presses to make crowns in quantities under that method?

It could not be told whether they would ever need presses or room to put them up until a successful method was discovered; for there is no pretense that Dueber would ever have thought of making his own crowns by the old method, which he says all the crown makers used, and about which there was no secret (Rec., p. 337, Q. 138), and in which, evidently, the double-action press is not used; for the core by the old method is *turned up on a lathe* (see Dueber, Rec., 324, Q. 25).

VI.

Dalzell's credibility as a witness is not successfully assailed.

We hardly feel justified in devoting much space to a discussion of Dueber's claim injected into these cases, that Dalzell stole crown tools from him when he left his shop.

From the argument made to the Court below, the object of this is to persuade the Court that Dalzell and the others that left Dueber's employ are thieves; that the Fahy's people are their aiders and abettors; hence nothing they say should be believed, and these patents should be surrendered to the Dueber Co. And it is attempted to drag Butts into the charge, although he left Dueber's December 18th, 1885, before Dalzell thought of leaving, and went to work at the Manhattan Watch Co., where he remained until April, 1886. The indictment for the larceny of these tools (four complete sets of crown tools and other tools) which Dueber obtained against Dalzell, Butts and others, is found Record page 477.

On page 479 of record it appears that John Price, whose testimony is intended to convince the Court that Dalzell, Butts, Pfeifer and the Fahys people are thieves, left Dueber's employ about a week after Dalzell left, and went to New York with Rudolph Dalzell and was given employment at Sag Harbor. At Dueber's he had been receiving $10 per week (R., p. 425, x-Q. 91). A detective, employed by Dueber, comes to Sag Harbor and employs him again for Dueber at $16 per week (R. 427, Q. 127). He immediately swears out warrants for the arrest of his former friends for stealing four complete sets of Dueber's crown tools, and is now employed at Dueber's at $16 per week (R., p. 423, Q. 70).

Are we to understand his increased skill as a machinist acquired during his few weeks' absence made him worth $16 per week instead of $10?

Two castings were taken from Dueber's at the time Rudolph Dalzell and John Price left. Dalzell says Price brought them, and Mr. Fahys says (R., 265, x-Q. 118) Dalzell spoke to him about these two pieces of casting and told him Price had brought them; that they belonged to Dueber and should be returned to him.

C. C. Critchley, who committed such havoc at Dueber's, before he left, and who was discharged from the Fahys Co. (R., 493, Q. 126), and full of revenge against that company and Dalzell (R., 494, Q. 130), happens to leave his place of employment at Hartford, Conn. (R., 483, Q. 6), and drop into New York, when the Dueber Co. had served notice to take depositions there (R., 493, Qs. 117-123), and is called by that company to prove he made the Exhibit Dalzell Tools while at Dueber's.

He says (R. 485, Q. 30 and 31) that through fear of arrest he made, while in Fahys' employ, a statement which is found (R. 495), and that this statement was subsequently changed to make it corroborate a fixed-up story, and put in the form of an affidavit which he swore to, which affidavit is found (R. 496), and that so far as that statement and affidavit contradict his testimony they are false. He could not tell his own handwriting in this statement when shown to him (R. 489, 71 x-Q. *et seq.*). He could not identify his signature to the affidavit (R. 490, 76 x-Q. *et seq.*). He appeared and testified before the Grand Jury in New York State to have Price indicted for perjury in swearing to the affidavits for the arrest of Dalzell, yet he can't tell what he swore to there (R. 490 and 491, Q. 85-89). He attended the trial of Dalzell at Newport, for the purpose of testifying for Dalzell in that case, yet can't tell what he said to Dalzell's counsel about these matters on that occasion (R. 490, 77 x-Q. *et seq.*).

Counsel for the Dueber Company seem to think there is something about Critchley and Price which makes it proper to receive unhesitatingly their statements as true. Critchley comes full of hatred and admitting himself perjured. He excuses the perjury by fear of arrest, but he fails to explain why he should fear arrest for stealing the tools which Dalzell took openly, and claimed the right to take.

After the jury were sworn to try Dalzell for this grand larceny, the case was settled on these terms:

That Dalzell should plead guilty to a trespass, and the indictments against the other parties be discontinued. The tools, made exhibits herein, which were part of those Dalzell was accused of stealing, were returned to him, and the attempt to convict any one of stealing tools from Dueber was abandoned. Yet this Court is called upon in this case to consider whether the said charge of grand larceny was true.

John A. Coburn, who came to Dueber's about three weeks before Dalzell left (R., 451, Q. 16), says (R., 453 and 454, Qs. 27 to 35) that before Dalzell left there were four complete sets of crown tools at Dueber's, with duplicate parts, in case of breakage, and other master-forces, about fifty pieces in all, and that, after Dalzell left, of these fifty pieces there remained only about twelve or fourteen, none of which were new, and most of which were not fit for use.

A brief consideration of this attempt to make Dalzell out a wholesale thief will convince your Honors that it is a malicious falsehood of Coburn's. Coburn admits (R. 455, Q. 47 and 48) this condition of the crown tools was not discovered until an invoice of the tools was taken after Critchley, Pfeifer and others had left.

Now, Butts left December 18, 1885. Dalzell left January 19, 1886, and the others did not leave until a week or so afterwards (R. 389, Q. 26), and during this week or so while Critchley and Pfeifer were there there was no thought of missing crown tools. Dueber's witness W. H. Brown says he entered Dueber's employ as foreman of crown department January 29, 1886, and did not discover there were any tools missing until he had been there a week or ten days, when, since they could not find certain forces, they concluded they had been taken away by somebody.

Thomas McLaughlin, who, after Dalzell left, took temporary charge of the crown department (R., p. 155, Q. 24), says (R., 154, Q. 16, *et seq.*) that, after Dalzell left, an inventory of the crown tools was taken, and to each tool a tag was attached, stating what it was, and this inventory was handed over to Mr. Dueber. He says (R., 157, Qs. 60-63) the tools for making the various sizes of crowns were not full and complete after Critchley and Pfeifer left; they had to make some new ones. That Coburn was present when the inventory was made (R., 157, Q. 59), and did not then claim that any tools were missing (R., 156, Q. 37).

Others of Dueber's employees say there were so many men working at crown tools that there ought to have been some made ahead, but none of the girls that operated the presses were called, excepting Annie Yockey, called by us, who says (R., 143, Q. 24-32) there were no crown tools made ahead at all, but that whenever a tool became worn out or broken the press operator would take up other work while the broken tool was repaired or a new one made.

Pfeifer says (R., 180-181, Qs. 8-11) there were no tools made ahead, and he corroborates Annie Yockey as to the course that was pursued when a tool was broken or worn out.

In the very nature of things, the statements of Pfeifer and Annie Yockey, are correct. Dueber wasn't manufacturing crown tools as an article of commerce. All he wanted was to keep the presses going. They were making four sizes of crowns. How natural it would be, if the core die for one size was broken, to put the press to making some other size while the tool was repaired, and, if the tool-makers were in this way enabled to keep the presses going, what more was wanted ?

Nor were there such a number of men working on crown tools that there ought to have been some made ahead.

Dalzell was superintendent and had little time and work at the tools (R. 183, Q. 37). Pfeifer did not work on crown tools at all (R. 185, x-Q 62), and Critchley and Butts spent part of their time on case dies and other tools (R. 185, Q. 66); and Dueber's witness

Brown tells us (R. 394, Q.s 6 and 7) it now requires two tool-makers to keep the defendant supplied with crown tools.

Yet Bradley says (R. 352, Q. 40) in about a week after Critchley left they could make all sizes of crowns. An examination of Bradley's answer to Q. 38, R., p. 31, and Q. 43, *Id.*, p. 352, shows the trouble with the crown tools was simply due to some fault of Critchley's before he left Dueber's. When Bradley took charge of the tool-room, Butts had been gone over a month; Dalzell had been gone over a week, and Critchley hadn't kept the tool-making up, but on his departure had mixed the tools all up, consequently it gave them some trouble for about a week to run the department.

We submit no claim as to what tools were left should be entertained without the production of this inventory made by McLaughlin & Coburn, which Mr. Dueber was careful not to produce.

According to Coburn, this inventory would only show twelve or fourteen worn-out tools.

It is claimed also that Dalzell stole the Dalzell Exhibits 1-16 from Mr. Dueber.

Mr. Dueber's employés say that the morning Dalzell left, in working hours, in the presence of some twenty-five or thirty persons, he put some crown tools in his coat pocket and put his coat on and went out.

Doubtless he did. He had taken these tools there, and, of course, he took them away again. There had been a confusion of his goods with those of Mr. Dueber's, and if on going away he took some of the tools that had been made at Dueber's in place of those, William Naul, Charles Butts, Charles Penkawa and his brother Rudolph testify he had, we cannot see that it amounts to anything.

Mr. Dueber undertakes to prove these tools are his, because he says (R. 328, Q.s 55, 60) the small-sized spot was ordered specially by him, as the first crowns having the larger spot could not be lapped as easily by his unskilled help. The reason he gives condemns his claim.

Our witness Caleb Marlow, an expert in that line, of New York City, says just the contrary is the case; that the larger the spot the easier it is lapped, and his reasons show the correctness of his testimony (R. 178).

We had hoped Dueber's counsel, if he desired to contradict this testimony of Caleb Marlow, would produce a witness outside of the Dueber shop. But no. Mr. W. H. Brown is the only one to be found to take the contrary position, and his testimony exhibits his knowledge in a marked degree (R., 507, *et seq.*).

A crown is also produced and made an exhibit, and it is said that it is one of many others which were returned to the Dueber Company by its customers, because the spot had been lapped through the gold. We find ourselves unable to believe that the Dueber Company sent out such specimens of work from its shop.

Mr. McLaughlin says (Record, p. 156, Qs. 40 and 41) this change in the size of the spot was made some time after Dalzell left.

It is hardly necessary to advert to the testimony introduced to impeach Dalzell's credibility as a witness, for in this argument we have not found it necessary to cite him except when corroborated by the circumstances and testimony of numerous other witnesses.

As to the testimony concerning his reputation in New York in 1876 and in Elgin 1879, it is all too remote to be competent.

Dueber's witness Geo. Messinger testifies to Dalzell's bad reputation in New York, but he says (Record, p. 387, Qs. 63 and 64) he never knew about it until he came to Newport.

As to the Elgin affair, Dalzell's reputation must have been good there, or he would not have been selected by his fellow workmen to represent them in their Colorado mining venture. Strange that the undertaking failed?

Dalzell must bear the blame of the failure, and be esteemed a liar because the encouragement he felt and gave proved to be unfounded (see Testimony of Frank Wilcox, Record, p. 463), and, when he mentions to Dueber's employees his mining interests in Colorado, he is esteemed a liar again.

No one at Elgin outside of this mining company knows of his bad reputation. He is said to have had a wretched reputation at Duhme's. Emil Bady, one of Dueber's employees and witnesses, says (Record, p. 413) the men all called him liar, and (Q. 32, p. 413) he mentions Mr. Cook, the spectacle maker, and Mr. Merz, the chainmaker at Duhme's, as having spoken of Dalzell as a liar. Both of these gentlemen testify in the case and say they never spoke of Dalzell as a liar, they never considered him so ; but, on the contrary, always found him truthful and upright, and that they never heard any one else speak of him as untruthful until Minor brought them Emil Bady's testimony in this case (Record, pp. 141 and 139). It is significant that, though others of Duhme's men were on the stand, not the slightest attempt is made to relieve Emil Bady in the premises. The balance of the testimony comes from the Dueber shop.

Our witness, Thos. McLaughlin, gives, we think, a fair and impartial statement of this matter. He says that, prior to Dalzell's leaving Dueber's, the talk about him was simply that the men disbelieved he could do what he claimed he could do (see Qs. 44–46, our Record, p. 156), and that he had never found him untruthful. None of the witnesses not now in Dueber's employ ever heard anything in the Dueber shops against his truthfulness until after he had left there.

That some of the employees of Mr. Dueber should talk against him after he had become involved in controversies with Mr. Dueber is not surprising. Mr. Dueber had had him arrested in Sag Harbor, brought to Newport, Ky., and was there prosecuting him for grand larceny, and also filed a bill against him in the Courts of Cincinnati to compel the transfer of these patents. Any reputation which Dalzell gained under such circumstances among Dueber's employees ought not, we think, to receive much consideration.

We are not forced out of the record in these cases to show Mr. Dueber's ability to tell the truth.

It is not improper to call attention to the fact that while nearly all the witnesses for Dalzell and the Fahys Co. in these cases are outside parties, having no interest in the suit, all those produced by Mr. Dueber are his employees, selected from the five hundred men in his shop. Only the fittest survive; Mr. Krug was dropped; how many others there were can only be conjectured. It is a fair inference that no employee knowing anything to Dalzell's advantage would be brought forward

Mr. Piper, though not in Dueber's employ, comes from New Jersey to Cincinnati to testify, leaving his shop in the busy season (Dueber's Record, p. 138, Qs. 191–195, and x-Qs. 200–203, p. 139).

It is noteworthy that even Critchley, who was an intimate friend of Dalzell's when these patents were applied for, furnishes no evidence that Dalzell was to assign them to Dueber.

As we said on entering upon the discussion of the question as to where these inventions were discovered by Dalzell, it seems to us entirely immaterial whether or not he discovered them while in Dueber's employ, since, under the authority of *Hapgood vs. Hewitt*, that would give Dueber no claim to the patents, and since it is conceded he did not discover them under the special contract set up in the plea in bar, considering the issues tendered by the bill, and the plea of the Dueber Co., it is difficult to understand the relevancy of most of the disputes introduced into the case by the Dueber Company, and further discussion of them would be improper.

We respectfully submit, the decree in case No. 13,813 should be reversed and the Dueber Co.'s bill dismissed for lack of equity and insufficiency of proof, and that the decree in case 13,814 should be reversed and said case remanded with instructions to overrule the plea of the Dueber Co. therein.

J. E. Bowman,
Counsel for Appellants.

Edmund Wetmore,
Of Counsel.

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Supreme Court of the United States

Allan C. Dalzell and The Fahys Watch Case Co.,
Appellants,
No. 213.] *vs.*
The Dueber Watch Case Manufacturing Co.,
Appellee.

Same
No. 214.] *vs.*
Same.

BRIEF AND ARGUMENT FOR APPELLEE.

JAMES MOORE,
Appellee's Counsel.

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May it please Your Honors:

These two suits are but parts of one controversy, and, although the earlier one brought, No. 214, is, in itself, but of small consequence now, still its pendency before the court when the parties to it, and the relief asked for in it, are recollected, well illustrates the animus of this litigation, and, probably, avoids the necessity of much argument that might otherwise be necessary to make clear the motives of some of the parties.

It is a suit for infringement by Allan C. Dalzell and the Fahys Co. against the Dueber Co., for the alleged infringement of two of the five patents upon which Bill of Complaint is based in the other suit, which latter, No. 213, is a suit by the Dueber Co. to compel Specific Performance of a contract between Allan C. Dalzell and the Dueber Co. to convey the five several letters patent, set out in the Bill of Complaint, to the complainant therein, the Dueber Co.

In the first suit, 214, Appellee filed a plea in bar to the effect that the patents sued upon were not the property of appellants, but were the property of appellee, but did not pray for a transfer of the patents therein, as it was then evident that another suit would have to be brought, in any event, in order to compel a transfer, as well of the other three patents involved in this controversy, and which, not being put in issue in that Bill of Complaint, it would have been multifarious to have prayed for their transfer therein.

Hence, the bringing of the other suit, No. 213, and prayer for the transfer of the five patents set out in its Bill of Complaint; and hence, too, the recognition that this embraced the whole of the controversy, and the stipulation accordingly, whereby all testimony taken in the other suit, No. 214, was incorporated into this p. 14.

THE PLEADINGS.

The Bill of Complaint in the main suit (213), alleges that Dalzell, being in the employ of the complainant (Dueber Co.) as a tool-maker, developed, or produced, the inventions claimed in the patents in issue, which are for tools, or improvements in tools, which he was employed in making; that upon the completion of these tools, he, Dalzell, asked the Dueber Co. to have patents applied for, for certain inventions, which he then alleged were embodied in said tools; and urged that if said inventions were not patented, they would, or might, be communicated stealthily, by some of the workmen in the factory, to other and rival manufacturers, who would use them in competition with, and despite the efforts of, the Dueber Co., thereby injuring the latter, who had been at great expense in devising the tools; and that he still further urged that if the Dueber Co. would permit him, Dalzell, to apply for such patents, and the Co. pay all the expenses necessary or useful in applying for, and obtaining, them, that they might be obtained for the benefit and protection of the Dueber Co., and that he, Dalzell, would not ask for, or require, any additional compensation for such patents as might be granted, which proposition was then accepted by the Dueber Co., and Dalzell was thereupon authorized to proceed, through a patent solicitor of his own selection, to procure patents for said inventions, the Dueber Co. then agreeing to pay all expenses incident to the procuring of such patents; that Dalzell did, in pursuance of this contract, select a solicitor and applied for patents; that the Dueber Co. faithfully complied with its said obligations under the said contract; that when some of the patents in issue herein had "passed for issue," the Dueber Co. presented appropriate drafts of assignment to Dalzell, and asked him to sign them, and thereby transfer the legal title to said patents to the Dueber Co., and authorize the Commissioner of Patents to grant them directly to said Co., as assignees of Dalzell; that Dalzell postponed signing said drafts until all the patents that had been applied for, in pursuance of said contract, should have "passed for issue," when, as he said, he would assign all together; that subsequently, Dalzell secretly and fraudulently procured all of said patents to be issued to himself, and thereafter refused to assign them, or any of them, to said Co., and still refuses so to do; that Dalzell, with the intention of defrauding the Dueber Co., has conveyed certain interests in, and licenses under these patents to the Fahys Watch Case Co., who, it is further alleged, then had knowledge of the facts and circumstances of the title to said patents, and of the Dueber's Co.'s interest therein; that Dalzell and the Fahys Co. had conspired to cheat and defraud the Dueber Co. out of the said patents, and, in pursuance of this confederacy, had filed a suit in equity against the Dueber Co., alleging therein the infringement by the Dueber Co. of two of said patents, which is the suit now before the court as No. 214.

The Bill also prays for specific performance and for general relief.

The plea in bar of the Dueber Co. in the other case (214) does not make the above allegations in the exact order in which they are given in the Bill of Complaint in No. 213, but the substance of the allegations in the Bill of Complaint are in the Plea in Bar thus, rec. 214 p. 7, ". . . and further agreed that any inventions or improvements made or contributed to by him, said Dalzell, should be patented at the expense of this defendant, and for its benefit exclusively, and that said Dalzell should execute proper deeds of assignment at the expense of this defendant, to be lodged with the applications for all such patents in the United States Patent Office, and said patents were to be granted and issued directly to this defendant . . .; that said patents were applied for with the permission of this defendant by the said Dalzell, and that all fees and expenses of every kind necessary, or useful, for obtaining said patents, including as well Patent Office fees as fees paid the solicitor, employed to attend to the work incident to the procuring of said patents, and drawing said assignments, to this defendant, were paid by this defendant."

It is possible that this statement of the pleadings of the Dueber Co. is unnecessarily prolix, but counsel for Dalzell and the Fahys Co., in their brief before the Circuit Court, appeared to be under a serious misapprehension in reference to their legal effect; and, for aught that I now know, may still be laboring under the same mistake. Shortly stated, that mistake was presented thus: Their brief stated that the consideration, alleged in the plea, for Dalzell's undertaking, was an increase of his wages, during November, 1884, that being after the inventions were completed, but prior to the making of the contract between Dueber and Dalzell, and it was argued that this prior consideration would not support the subsequent contract.

It was then further stated, or rather intimated, that the allegations in the Bill of Complaint were substantially the same in this respect as in the Plea, *the actual allegations in the Bill not being further recited, or stated, in that brief.*

For this reason I have stated here, in substance, the actual allegations in the Bill of Complaint, and have quoted from the plea sufficient, as I submit, to show that it, also, alleges a valid and sufficient consideration to support the undertaking of Dalzell, without reference to the allegation of increase of wages.

Surely, it can not be objected to the plea in bar, as a defect, that it alleges, in accordance with the truth, that Dalzell's wages were raised, so long as there is, in addition, a valid consideration alleged? And it is to be recollected in this connection that the contract in question is an "executed contract," as will appear further along.

GENERAL STATEMENT OF THE FACTS.

The five patents in question have relation to tools for making watch crowns and pinions. They have been granted to Allan C. Dalzell, and for the purpose of this issue, it is admitted that he was the first inventor of what is claimed therein.

The strictly germane—essential—facts are few, and hardly admit of doubt—the great body of the testimony having been necessitated by a most herculean effort at rough and tumble swearing, by Allan C. Dalzell.

Instead of merely reciting these facts, I will assume that your Honors shall have been possessed, through the oral argument, of them; and will here state so much of them, and their surrounding incidents, as are not denied by either party, or, if at all denied, where the proof of them is so clear that no dispute can arise—this as a clearing of the ground for the discussion of disputed facts.

Dalzell worked for the Dueber company from January, 1883, until January, 1886. During this period the manufacture of watch crowns was commenced by said company, Dalzell, assisted by others in the employ of the Dueber Co., made the tools first used in this manufacture. These tools embodied the alleged inventions claimed in the patents in issue.

It is not denied that Dalzell worked for the Dueber company, with its materials, and had his wages regularly paid while working on these tools.

It is not denied that it took Dalzell substantially six months to make one set of these crown tools, *i. e.*, crown tools sufficient to make one size of watch crowns, nor that it took substantially six months more to make crown tools sufficient to make the different sized crowns used in the Dueber establishment.

It is not denied that soon after all these crown tools were completed, and in use, Mr. Dueber and Allan C. Dalzell had, at Dalzell's instance, a consultation in the factory, upon the question of applying for patents for them; nor that, in pursuance of such consultation, a patent solicitor—stranger to Mr. Dueber—was sent for by Dalzell, who came to the factory, and after a consultation, or consultations, with Mr. Dueber, proceeded to apply for the patents in question. It may be remarked, in passing, that these conversations are disputed; and the truth of what occurred at them forms the gist of this controversy; but I proceed.

It is not denied that as this solicitor progressed with his work he made out bills for his fees, as well as for Patent Office fees, against "The Dueber Watch Case Manufacturing Co.," as debtor, and that such bills were regularly paid as presented, and charged to "Expense Acct." upon the books of the Dueber company.

Let it be recollected here that all these bills were paid long before there was any controversy between the parties; and also that during the latter part of the time that this work was being done, and these bills were paid, there was a private correspondence kept up between Dalzell and this solicitor; private, I say, because no person connected with the Dueber concern knew any thing of it then; there is no denial of any of these things.

Neither is it denied that during all this time Dalzell's wages were regularly paid; nor that nothing was ever said—not a word—by either Dalzell or Dueber to the other about there being any running account between them, or about any contract, or understanding, in reference to Dalzell being responsible to pay these fees.

Things ran along in this way until some time in the summer of 1885, when some of the applications for patents had been passed for issue, and when the Dueber company had sent to the solicitor at his request, the money to pay patent office final fees upon six applications, blank assignments were presented by Mr. Moore (who, by the way, is sometimes confused in the record with the writer hereof), the General Manager of the Dueber company to Dalzell, and he was asked to sign them, and thereby assign the patents in question to the Dueber company. Dalzell did not sign them.

The Genl. M'g'r of the Dueber company, W. A. Moore, states, A. 3, p. 239, that the reason Dalzell gave for declining to sign the blank assignments then was, that he preferred waiting until all the patents had issued, when he would sign all together.

Mr. Dueber testifies to a conversation with Dalzell about the same matter, held subsequently to the conversation with W. A. Moore, in which he states that Dalzell gave the same reason to him that he had given to Mr. Moore for postponing putting his signature upon the blank assignments, A. 40, 41, p. 230.

Dalzell denies that he made the statements ascribed to him by Mr. Dueber and Mr. Moore, and says that he refused point blank to assign the patents.

It is not my purpose to discuss the truth of this testimony at this place; that will be done later. But as a disputed fact of importance, this lay in the path of my narration, and I have deemed it proper that your Honors should have before your minds the statements of each side about it while considering the undisputed facts—or, in other words, that you might measure the probabilities as to which party tells the truth by comparing their several statements with the admitted facts in the case, irrespectively of a direct weighing of the immediate testimony.

This occurred about July, 1885, vide Moore's 6th, p. 240. Three of the patents in question were granted October 27, 1885, a fourth in September, 1886, and a fifth in December, 1886; the sixth has never been granted.

Dalzell continued in the same relation to the Dueber company until January, 1886, when he ran away and carried with him (stole) all, or nearly all, of the Dueber crown tools that were fit for use. No further conversation was had about assigning the patents before he left. He left before the patents had all been granted!! If it be said that I ought not to assert, among the undisputed facts, that Dalzell stole the Dueber crown tools when he ran away, as that is disputed, I answer yes, it is disputed, voluminously disputed by Dalzell, but "Resp'dt's Ex. Dalzell Indictment," p. 477–9, shows that when Dalzell was upon trial, under indictment for Grand Larceny, in stealing these very tools, he plead guilty to a trespass and submitted to the judgment of the court. And the court thereupon, having heard some of the evidence for the prosecution, adjudged that he be fined one hundred dollars, and the costs of the prosecution; so that, as I respectfully submit, I am entitled to state this among the *undisputed* facts of the case.

When Dalzell ran away, he came to New York, in pursuance of an arrangement made by him at a hotel in Cincinnati with Joseph Fahys, pres't., and Henry F. Cook, secy. and treasurer of the Fahys Watch Case Company, and went to work for said company under contract shown in "Resp'dt's Ex. Dalzell-Fahys Assignment No. 1," p. 540. By this contract Dalzell was to have forty dollars per week for his services, for a term of three years, which was ten dollars per week more than he had received from the Dueber Co., and the Fahys Co. got an exclusive license under the patents in controversy during this period. And, if the Fahys Co. should make crowns containing these inventions for *other watch case concerns*, Dalzell was to be an equal partner with said Co. in such manufacture, and have one-half the net profits thereof.

At the hotel interview in Cincinnati between Dalzell and Fahys and Cook, Dalzell had explained, by the aid of the patent drawings, the watch crown tools in question, and had given Fahys and Cook his opinions about the advantages arising from the use of such tools. He had also told them *that such tools were in use in the Dueber factories*, where he was then employed, but he did not tell them that the Dueber Co. had any interest in these patents, and neither Fahys nor Cook made any inquiries upon that point, although then informed by Dalzell, as before stated, that the inventions were then in use in the Dueber factories; *at least that is the testimony of Dalzell, Fahys, and Cook, the only parties who knew what took place.*

So soon as the Dueber company was informed as to Dalzell's movements and purposes, and within two weeks of his running away, it caused a circular letter to be issued to the trade, printed at p. 241, a copy of which was received by the Fahys company by due course of mail, and before they had made any expenditures for the introduction of the new manufacture. But this did not cause any hesitation or inquiry by the Fahys company. They went right ahead in the use of the inventions in question, and so continue until the present time.

The above skeleton is weaker than the facts would justify—this because I have omitted from it all disputed facts. Sufficient, however, is stated, I submit, to show conclusively that there was a contract with reference to the property in these patents, and sufficient, too, to enable your Honors to point unerringly, not only to the general character of that contract, but also to the fact that there was a deliberate plot to steal these inventions.

THE TESTIMONY OF MR. DUEBER, P. 223 ET SEQ., SHOWS CLEARLY WHAT OUR CONTENTION IS IN THIS CASE.

It is, in short, that Dalzell first suggested that the invention in question be patented; that he extolled the prudence of patenting them, for the benefit of the Dueber company; that he offered to waive any claim he might have as inventor, A. 24, p. 226; and that then Mr. Dueber acquiesced in the suggestion, and accepted his proposition; and after some immaterial conversation about the solicitor to be employed, authorized Dalzell to engage one and proceed with the work. It may be noted here, that though Dalzell voluntarily offered to waive any claim he might have as inventor, Mr. Dueber, by no word or act, suggested or admitted that Dalzell had any such claim. There is nothing in the testimony of Mr. Dueber that tends to indicate that that phase of the subject was at all present to his mind.

I say that this was a completed contract, perfectly understood by both parties, whereby the patents to be obtained upon the inventions embodied in these tools should belong to the Dueber company. I say, further, that the subsequent conduct of the parties is conclusive that both had a perfect understanding of it at the time this contract was made.

The solicitor, acting under the immediate instructions of Dalzell, made the Dueber Watch Case Mfg. Co. Dr. in the bills he presented for his own and patent office fees; p. 242 et seq.; these bills were paid by respondent without any question; they were by it charged into the "expense account," Dueber A. 32a, p. 228, and testimony of Edward Busch, book-keeper, p. 294 et seq.; during all this time Dalzell's wages were paid regularly, Dalzell's testimony, A. 313, p. 67, and not only was there no charge against Dalzell by the Dueber Co. for the moneys thus paid out, but the subject of making such a charge never was discussed, or even suggested, by either of the parties to the other. Dal. 314 to 317, p. 67.

It ought to be remarked here, that this solicitor, Mr.

Whitney, was one of Dalzell's counsel in this cause, and as such he attended at the taking of some of complainant's testimony. Rec., p. 16. *He has not been called to testify.*

DALZELL'S THEORY.

Before entering upon the discussion of facts disputed in the record, it may be convenient to your Honors to state here Dalzell's theory of the ownership of these patents, so that the respective contentions of the parties may be contrasted by the court.

Dalzell's 85th and 91st answers in the direct (p. 28 et seq.), and his 247 to 251 answers in the cross-examination (p. 55), contain his testimony upon this matter.

It is, in brief, that there was no contract or understanding about it, except that Mr. Dueber offered Dalzell all the money he might want, and at the same time begged permission (with hat in hand, I presume) to recommend a solicitor of patents. Dalzell's language, A. 85, is:

"He further stated that if I went to Mr. Moore and asked him for money I could have it, and also asked if he could recommend me to a solicitor of patents."

And in answer 91 Dalzell describes what took place when the solicitor Whitney arrived:

"I said to him, 'Mr. Dueber, I am hardly able to proceed, as I have not the money to engage this gentleman with.' He says, 'You can have all the money you want; tell Mr. Whitney what you want him to do, tell him to proceed immediately, and we will settle about money matters afterward.' I said, 'All right, sir.' That ended the conversation."

But notwithstanding that "that ended the conversation," according to the foregoing, there was something more said then, or about that time, according to Dalzell, for in his 249th answer, p. 55, he says:

"*Previous to the patents being taken out before application* was made, I telling him that I had right, title, and property therein, and they were worth considerable to me, or to such an institution as his; he said he knew they were, and I should be paid for them, remarking that we can beat all other concerns now in the case business."

I am not now discussing the truth of any of these statements of Dalzell, for if I were it might be a little difficult to formulate a statement of his position in this matter. For instance, in the portion of his 85th answer, already quoted, he said Mr. Dueber asked permission to recommend a solicitor of patents to him, while in 263d answer, p. 59, he said: "I do not think that either asked the other to suggest the name of a patent solicitor; he stated that he had no faith in his, and asked me if I knew one. I told him no, *only the Munn & Co.*"

And in his next answer, 264th, he said: "There was *no one suggested* at this conversation."

A similar difficulty would be met in an effort to get at the exact facts, if Dalzell's statement, in his 85th answer—that Mr. Dueber promised him what money he might want, and upon the faith of which promise he brought Whitney, the patent solicitor, to the factory—be compared with his statement in the 91st, after the solicitor arrived, that he went to Mr. Dueber and told him he was not prepared to proceed for want of funds.

But without giving critical attention, in this connection, to Dalzell's language, I desire to formulate a statement of what he evidently desires to be understood as the result of his testimony.

It is that Dalzell having made these tools for the Dueber company, and being the inventor of such inventions as were evolved by such making, he went to the president of the company and told him (Ans. 249, p. 55) that he, Dalzell, "had right, title, and property therein, and they were worth considerable to me, or to such an institution as his." That Mr. Dueber made no protest against this way of viewing of it; did not claim any interest in the inventions, not even a qualified one of the right to use his own tools; but, on the contrary, he entirely acquiesced in Dalzell's statement, and replied, according to Dalzell: "He (Dueber) said he knew they were, and I (Dalzell) should be paid for them." . . .

are all fiction; all part and parcel of the same scheme, concocted to enable Dalzell to steal these patents.

1ST. DALZELL DID NOT MAKE THESE INVENTIONS BEFORE HE WENT TO WORK AT CROWN TOOLS IN THE DUEBER WATCH CASE MANUFACTURING COMPANY'S FACTORY.

a. It may be remarked *in limine* that Dalzell was engaged, substantially, six months in working at crown tools, in factory A, before he had completed one set; *i. e.*, sufficient to make one size of crowns; and six months additional before he had tools completed that would make all sizes of crowns.

Testimony of Dueber, A. 88 to 94, p. 332.
" " Cook, " 10 to 12, pp. 387–8.

It may be remarked here, that there are three witnesses named Cook, and many of the other witnesses have testified two or more times each. The writer thinks that he can best aid the court in avoiding confusion from these causes by giving the proper page of the record for each reference, which will be done throughout.

Testimony of Stecht, A. 7 et seq., p. 400.

It is to be recollected, in connection with Stecht's testimony, that he went to work in the crown department on the 9th day of July, 1884.

Testimony of Born, A. 7 to 8 p. 405.
" " Stricker, A. 75 et seq., pp. 375–6., A. 18 et seq., p. 502.
Testimony of John Price, A. 1 to 14, pp. 515–16.
" " A. C. Dalzell, A. 56, p. 22.

It will be observed, upon reading above answer (56) of Dalzell, that immediately after answering "about a year," he commenced to retract and qualify his answer. He saw the effect of his admitting the truth, and tried hard, before closing his answer, to obliterate its effect. In this effort, he says that during this year he made other tools for making other portions of watch cases. The witness

Charles E. Stricker worked with Dalzell in the crown department from the beginning, A. 75–7, p. 375, and says that the only tools made by Dalzell, other than crown tools, during this year were those for making plated pendents. A. 139–40, p. 380. But these were made before he commenced to work upon crown tools, Dueber's 87–8, pp. 331–2, and the only work that he did after he commenced crown tools was the making of cutting dies for a silver rim, which would occupy one man about two weeks' time. Dueber, A. 90–1, p. 332.

The other portion of this answer of Dalzell, that much of his time was occupied in adapting the Dueber machinery, *i. e.*, the double-action presses, to his tools, is perhaps the clumsiest falsehood that Dalzell has woven into this record, and I know of no stronger expression than that. Its absurdity will be pointed out later, when we come to explain the impossibility of changing a double-action press, after it is made, to fit a tool, and to demonstrate that Dalzell had no crown tools at that time.

The effect of this testimony—that Dalzell used up about six months in making the first set of crown tools, and a year in making the several sets necessary for the various sizes used in the factory—upon Dalzell's statement that the inventions were made before he went to work for the Dueber Co., and that he brought with him to its factory full sets of these tools, will be more fully appreciated when we refer to the testimony of Coburn, master mechanic for the Dueber Co., when Dalzell ran away in January, 1886. Coburn testifies, A. 41, p. 455, that, notwithstanding the demoralization of the crown department, as the result of Dalzell and his confederates carrying away all, or nearly all, the good crown tools with them, it took "about three weeks" to get the department running again. *Vide* testimony of Bradley, 39, 40, pp. 351–2.

Full references to the fact that Dalzell did carry away these tools, and left, and intended to leave the crown department stranded, will be furnished at the appropriate place. Here I only desire to point to the fact that sufficient tools were made by one man in about three weeks to supply the sizes of

And Mr. Dueber being thus informed, and having solemnly admitted that the title was in Dalzell, gave him, according to his 85th and 91st answers, already quoted, *carte blanche* for all money needed for the procuring of these patents—Mr. Dueber merely adding:

"We will settle about money matters afterward." Dals. A. 91, p. 29. And, if Dalzell's testimony represents the facts of the case, the Deuber Co., and its president, not only continued this generous treatment of Dalzell, that his testimony imputes to them, but the said company outdoes the alleged generous promises of its president; and, instead of coming to a settlement, "about money matters afterward," they actually present all this money to Dalzell, by charging it into the expense account!!

Dalzell did not add, but no doubt would have added, if questioned about it, that Dueber's motive for the stupidity imputed to him by Dalzell, was that thereby Dalzell might have an opportunity of going to a rival manufacturing company and giving it the benefit of these inventions; and by the aid of its capital prevent Dueber from using them.]

It will be obvious to Your Honors, from this statement of the controversy, that the conversations between Mr. Dueber and A. C. Dalzell, occurring prior to the making of the applications, for these patents, contain the substance of the issue.

There is no direct testimony in the record to the statements made by the parties to these conversations, except those of the parties themselves; and, I think, it may be safely added, that it was the knowledge of this circumstance that induced the actions of A. C. Dalzell, which, in their turn, produced this litigation.

The main facts of the case thus depending primarily upon the testimony of Dalzell and Mr. Dueber, who disagree generally upon essentials in their testimony, has made it necessary to take a great deal of testimony upon collateral matters; which, under other circumstances, might have been of doubtful materiality, but under the present circumstances of this case have become of the first importance in throwing light upon the situation of the parties, and in testing their credibility.

Before commencing an examination of the principal question of the case, by the light reflected upon it by these collateral facts, I desire to say that A. C. Dalzell has been impeached—successfully impeached—as unworthy of belief, if ever a witness was impeached, or if it be possible to successfully impeach a witness. But, as I believe, a fair review of the testimony will be absolutely conclusive of the utter and shameless falsity of the story told in this record by Dalzell; and, further, as a conclusion arrived at through this channel will be more satisfactory to Your Honors, I have determined to postpone further attention to the impeaching testimony, until I have first submitted my view of the case upon the issue made, remarking, in passing, that an index, to be appended, will show Your Honors, where my comments upon the impeaching testimony will be found.

Dalzell says, in substance, that prior to commencing the making of watch crown tools for the Dueber Co. the inventions in controversy were completed. That before he commenced to work for said Co. he had full sets of the tools in question made by himself, which were his own property, and were then in his possession; that when he went at crown work for the Dueber Co. it was by agreement with Mr. Dueber to introduce his own inventions, then in existence, into the Dueber factory; and that he actually brought these crown tools of his own into the Dueber factory and used them upon the Dueber work.

It will be apparent at a glance that if there were truth in these statements it would seriously change the relative situation of the parties, and put a different face upon this controversy.

We will not stop to point out where Dalzell has said these things; his counsel will do that, no doubt, for they are said plentifully by him.

But I do propose to show that there is not one iota of truth in any one of them; but, on the contrary, that they crowns immediately needed. As we pass from this I may remark that, if Dalzell had these inventions completed when he entered the employ of the Dueber Co., it is remarkable that it took him six months to make the first set of tools, and yet it only took Bradley three months, after Dalzell left, to make new tools for all sizes of crowns. This discrepancy calls for an explanation, but the record furnishes none whatever.

b. NO CROWN TOOLS WERE EVER BROUGHT TO THE DUEBER CO.'S FACTORY.

The affirmative of the above is part of Dalzell's testimony that the inventions were complete when he went to work for the Dueber Co. Dalzell's A. 50–3, pp. 21–2. His statement is, that he brought "Four sets of master tools, one complete set of dies for the making of crowns, and parts of other sets which I fail to remember," and that they were carried to the factory by his brother Rudolph in a wooden box, during November, 1883. It would require but a casual examination of the deposition of Rudolph Dalzell, p. 102 et seq., which is exclusively occupied with this incident, to demonstrate that he was carefully coached in his part. Rudolph arrived in Newport, Ky., during the early days of November, 1883, and Allan C. Dalzell timed it exactly, accidentally of course, that these tools should be carried to the factory by Rudolph. Allan had been at work for the Dueber Co. about ten months when Rudolph came; but the carrying of the tools from Allan's house waited the coming of Rudolph. Allan may explain that, prior to that time, he did not want the crown tools; that he was then going to work at crown tools in factory A. But Allan Dalzell did work at crown tools, substantially like some of those patented, for three or four weeks, in factory B, during January and February, 1883. Piper, A. 31, p. 300; Bradley, A. 18, p. 350. Perhaps it was an instinct of a slight hitch in this explanation that induced Dalzell to exhibit so much pugnacity in his cross-examination when he was asked if he did not work in factory B before he worked in factory A. *Vide* his 189th to 197th, p. 44. We wish Your Honors to read these few answers, not for the above reason merely, but because they furnish a fairly good illustration of Dalzell as a witness. In answer 189, he is reasonably explicit that he first worked in factory A. After that, he is not explicit: but to save comment, and by way of test of his special accomplishments as a witness, I would ask Your Honors, after having read the above testimony, to say, does Dalzell mean it to be understood that he first worked in factory A, or in factory B? The fact itself is not important, for it is proved beyond dispute that he worked for some weeks at tools for crown shells (not crown pushes) in factory B at time stated above.

I think it is not a violent assumption that Dalzell's reason for selecting this occasion as the time that it should appear his alleged crown tools were brought to the factory, was because there was no other man but his brother Rudolph upon whom he could rely for performance of the part that Rudolph has played in this case.

But now, if no other man saw these tools being brought into the factory, and no other person ever saw them in the factory, I submit the assumption, as a safe one, that no such tools were brought into the factory. At the start, it is obvious that if such tools were brought into the factory it ought to be a very easy matter to furnish full proof of it. They were brought, it is said, in a wooden box, and it must have been of considerable size to hold the tools recited by Dalzell, No person can enter the factory without a permit, except workmen, and they can not enter, or leave, except under the surveilance of a guard. Dueber's 5th, p. 321; 168th, p. 339; Piper's 122d, pp. 311–2.

No testimony of any watchman, guard, or officer of the company, that such tools were brought into the factory at any time is offered by Dalzell, nor is there any evidence that they were ever in the factory, except the statements of Allan and Rudolph Dalzell, referred to above (and that of Butts, a member of the Dalzell gang, to be adverted to hereafter), and upon these statements their case rests, so far as this fact is important.

This puts upon me, practically, the proof of a negative, but I don't object—it is not a difficult one.

Mr. Dueber says, A. 4, p. 321, that it is "impossible" that such tools could have been brought into the factory without his knowledge.

Mr. Piper, master mechanic of the Dueber factory at time Dalzell went to work there, and continuing such until after the time Dalzell professes to have brought the crown tools to the factory, A. 2, p. 298, states that "all the tools brought by Dalzell to the factory were crude and primitive, and worth about $3." They were only "such as toolmakers are supposed to have;" there were no crown tools among them. Piper, 89 to 92 pp. 308–9.

This accords with Dueber's testimony, A. 6–9, p. 322, and "Resp't's Exhibit Critchley's Receipt for Dalzell's Tools," p. 348.

Charles E. Stricker worked as an assistant to Dalzell in the gilding room, and went into the crown department with Dalzell when it was started. A. 75, p. 375. He remained in the crown department "about three months." A. 95, p. 377. He saw Rudolph Dalzell when he first came to the factory, and Rudolph brought no tools with him. Ans. 93–4. He was in Dalzell's house, on Ann street, Newport, half a dozen times, was familiar with all the rooms in it, and describes them. A. 83 to 87. He never saw any tools of any kind or tool chest in that house. A. 88 to 91. Dalzell never told the witness that he had any crown tools, A. 92; and this although Dalzell was evidently very intimate with the witness. A. 50–51. During the three months that witness worked in the crown department he never saw a crown tool except what Dalzell was working at. A. 97. And it might be added that the witness' observations of Dalzell's early efforts at making crown tools, p. 375–6, are quite pursuasive—to put it in the mildest possible form—that Dalzell was engaged upon a task entirely new to him.

This witness' testimony is *in my judgment* conclusive of this question, but I pass on.

George Mesinger testified that he had been a shopmate of Dalzell's in New York before either came to work for the Dueber Co. A. 2 to 6, p. 382. He was intimate with Dalzell in Newport, and visited him at his house three or four times a week. A. 24, p. 384. He went to work for respondent January, 1883, A. 6, the same month that Dalzell commenced. Dalzell never told him that he had any crown tools at his house, A. 30; the witness never saw any tools at Dalzell's house, A. 29; he never saw a tool chest there either, A. 31; finally, Dalzell never told him that he had theretofore worked at crown tools, nor that he had any inventions in crowns, or crown tools. A. 36.

George Cook: This witness was in the crown department from the time it was started until Dalzell left. A. 19, p. 388. He says Dalzell did not bring any crown tools into the shop, A. 18; and that it was not possible that Dalzell could have brought such tools into the factory without witness knowing it. A. 20. And in answers 13 to 16, p. 388, he describes the same bungling efforts "quarrels with his tools," the "customary result of groping with an unfamiliar subject," that were observed by Stricker.

The only witness introduced for Dalzell, in addition to himself and his brother Rudolph, who had the temerity to say boldly that Dalzell had crown tools brought into the Dueber factory, was Charles W. Butts, one of the Dalzell conspirators, who left the Dueber factory about the time the remainder of the Dalzell crowd left the factory.

His testimony is at p. 82 et seq. I propose a short review of it with the purpose of saying that the offering of such testimony is, in itself, a confession: 1st, that Dalzell's story depends, and was intended to depend, upon his being able to prove that he brought crown tools to the Dueber factory; and, 2d, that he was compelled to rely upon such reckless and shameless mendacity as is apparent upon the face of Butts' story.

In A. 26 and 27, p. 84, he says he saw Dalzell's crown tools in factory A of the Dueber establishment, on a Sunday afternoon, *before going into the employ of Mr. Dueber.* He went into the Dueber employ in *September*, 1883, A. 8.

This is the substance of his direct testimony upon seeing the Dalzell tools in the Dueber factory.

It will be recollected that the testimony of Allan C. and Rudolph Dalzell, was that the tools were first brought to the Dueber factory in *November*, 1883.

Question 34 asked Butts to state more definitely when this Sunday afternoon, that he saw the tools in the factory, occurred.

In his answer he says that it was while he was still at work for the Queen City Sewing Machine Co., and after Dalzell had left that concern.

Butts worked for that Sewing Machine Co. from August, 1882, until September, 1883, A. 7 and 8, so that he must have seen the tools during that interval.

But Dalzell left fhe Sewing Machine Co. in January, 1883, A. 66, p. 88, and, as it was after Dalzell left the latter company that he saw the tools, the interval within which he saw them is narrowed to between January and September, of 1883. In answer to Q. 35, which asks for greater definiteness, Butts, after referring to a pocket memorandum book, fixes the date as February, 1883.

In answers 58 and 59, he says the memorandum book has no date for visit to factory A in question. *He thought he might be asked to exhibit the book.(?)*

In A. 60–63, he states the memorandum book furnished the date when he went into the employ of the Sewing Machine Company, and he "remembered very distinctly," that Dalzell only worked for the Sewing Machine Co. a short time, and then went to work for the Dueber Company, and that was what enabled him to recollect so distinctly that the visit to the factory occurred in February, 1883.

In A. 64–66, he states that Dalzell had been in the Dueber employ but a short time when the Sunday visit took place; Dalzell *might have been there a month, but was not two months there* then, and he further states, in that connection, that Dalzell left the Sewing Machine Company shortly after the 1st of January, 1883.

In answer 67, he aims to nail it up tight, he recollects that it was a cold day, that he had just bought an overcoat.

And so it remained until after the noon recess, from which he returned and *voluntarily* stated that it was not February, 1883, the Sunday afternoon visit occurred, but it was in 1884, A. 89. He went out with Dalzell to lunch, A. 90.

In re-direct he answers a question of Dalzell's counsel, 91, that no person called his attention to the mistake. And he recollected that he was mistaken by recollecting that he was in the employ of the Dueber Co. upon the occasion of that visit, A. 93.

Dalzell's counsel did not ask him how he, a mechanic, working in Sag Harbor, about 100 miles from New York City, came to have *a room* (A. 92) in such near proximity to the Potter Building, that during a recess of an hour or less, he could go there and "think the matter over." Nor was he asked how he, notwithstanding his departure and return with Dalzell, managed to go to his (my) room and deliberate.

In his answer 60, he made the date of February, 1883, certain, by recollecting that Dalzell was working for the Dueber Co., and he, then working for the Sewing Machine Co., had made him a friendly call, Sunday being an off day, and the afternoon being the appropriate part of the day, and after "thinking over the matter," and a talk with Dalzell, he knows that it was in February, 1884, because when he paid that visit he was working for the Dueber Co.

c. But the essence of the proposition under discussion—that Dalzell did not make these inventions before he went to work for the Dueber Co.—is that he never thought of any of them, so far as that can be told from his words and actions, before his coming to Dueber's. This involves a review of the substance of Dalzell's testimony, for his pretenses, in this respect, derive no aid from any other witness, as will be shown further along.

In his 19th to 25th answers, p. 18, he makes his general statement that he commenced making the crown tools in question in the fall of 1880; that the work upon them was done at his own house; at the machine shop of James (or John) Robinson, in Cincinnati; in the shop of the Duhme Watch and Jewelry Company, in Cincinnati; in which latter place he worked at night only at the crown tools; and at the Queen City Sewing Machine shop, in Cincinnati; and that prior to his acquaintance with Mr. Dueber, which was in the fall of 1882, he had so far succeeded with the tools that he had made a perfect crown with them. This, taken in connection with his 52d and 53d answers, p. 22, which is the next direct reference to this subject in his deposition, would go to prove that not only were the inventions complete before he started to work for the Dueber Co., but that he had the master forces completed for all sizes of crowns that were actually made subsequently at the Dueber factory; and, in addition to this, one full set of dies and parts of the other sets.

In answer 127, p. 34, he affirms, substantially, his former story of where he did the first work on the crown tools, and introduces some new names: says he had forgings and purchased steel from Strathem and Price, and had some work done in the machine shop of George Keen, Pearl street, Cincinnati. In answer 138, pp. 35–6, I think he means to be understood as saying he had the use of a drop press, his language is: ". . . and could not be pursued, as I had to get the use of a drop press, the property of a steel engraver on Fifth street, who is now in the same shop as John Robinson, I forget the name of the party, I could not get the use of the press or drop for three days, in which time I turned the aforesaid hubs. . . ."

A reference to the context will show that the time referred to here is when he was working for Fox Bros., A. 131–135, and before he went to work for the Duhme company.

In answer 148, p. 37, he says that when he went to Duhme's his invention was in a crude shape, because he had neither press nor drop, and didn't know of any he could hire, and he goes on to say he used a drop and press belonging to the Duhme company. It may be said here that this removes the Fifth St. steel engraver, above referred to, from the case, and with him all pretense that Dalzell ever had access to either a press or drop before he went to Duhme's, during his stay in Cincinnati, which includes all the time within which Dalzell claims to have given attention to the inventions in question; nor is there any other statement of Dalzell inconsistent with this; and while we are trying to analyze and make a formal statement of Dalzell's testimony, for the purpose of comparison further along, we may further say that in answer 142, p. 36, Dalzell lets George Keene, and the Pearl Street machine shop from the case, so far as the question of where these tools were made, as it appears from this answer that the only work he did at Keene's place was to turn off a lap, or polishing wheel.

Keene was called to testify by Dalzell in this cause, p. 117, but it is not clear for what purpose, as his testimony develops nothing in addition to what is above stated.

From his 148th and 158th answers, pp. 37 et seq., Dalzell details what he did at Duhme's upon his tools; that he worked overwork in the evenings and at such times, when there was no person in the shops, except the watchman and himself, he used the drop belonging to the concern to strike up his dies. He didn't tell any person in connection with the establishment about the striking up of these dies. The use of their press for his own purposes "was so trifling an affair that he did not entertain it." A. 159.

It ought to be remarked here that Dalzell says, in the answers referred to, and in other places in his testimony, that he showed the product of this work, that is, crowns, to some of the people connected with the establishment. This part of his story no effort has been made to probe, for the reason that a watch crown was a common article of commerce, the exhibition of it would have no tendency to show how it was made; hence the proof, one way or the other, of whether he exhibited crowns, or claimed to have made them, would have no significance in the inquiry we are engaged upon. Besides, slight familiarity with Dalzell's habits, as shown by the testimony in the cause, shows that he constantly carried samples of all, or almost all, the devices that enter into the construction of a watch case, and a great variety of specimens of jewelry, which he exhibited to every person who would listen to him; and these exhibitions were usually accompanied by Munchausen stories of his great ability and unheard-of experiences. For proof of these assertions, I refer to the following testimony:

Dueber, A. 35, p. 229; Piper, A. 7 to 11, pp. 298–9; Bradley, A. 57, p. 354, and 47 to 49, pp. 352–3; Cook, A. 16 to 17, p. 388; Fox, A. 17, 20, pp. 410–11.

Add to this the fact that the tools, or many of them, were of novel construction, the case is based upon that assumption. They could be made or used only by the aid of certain machinery; consequently, their manufacture, and their use, can be infallibly traced; and it would be pitiful dodging which would permit the exhibition of watch crowns, especially by such a person as Dalzell, either as an excuse or substitute for the proof of the manufacture of the tools—the embodiment of the inventions, or in the slightest degree to obscure the necessity for such proof.

And further, crowns were made at the Marion, or U. S. Watch Co.'s factory, where Dalzell worked (Naul's A. 8, p. 94; A. 75–80, pp. 101–2, and he, likely, in accordance with his custom, carried away some of them for "samples." And see testimony of Milne, A. 8 to 14, pp. 498–9; where Dalzell could, and most likely did, select crowns, cores, and shells of gold and silver for "samples," and that without asking permission! For his habits in this respect, see Critchley, A. 41, 42, p. 486; Price, A. 66, p. 423. And still further, as he exhibited crowns to Wm. F. Oliver in 1880, before the time he claims he made his crown tools, it is certain that they were the crowns that he took from these places that he exhibited among his other "samples." A. 8, 15, pp. 115–16.

It will appear further along that Dalzell was not at Robinson's place after he went to Duhme's, and that he, Dalzell, does not claim to have had crown tools until he made them at Duhme's. A. 155, p. 38.

Pursuing our review of Dalzell's testimony, I desire to collate his statements as to what explanations he gave to the various parties to whom he says he showed crowns prior to his being employed by the Dueber Co.; for if such exhibition was accompanied by an explanation as to how they were made, such explanation would be pertinent.

(Before proceeding with this, I desire to submit a suggestion: When Dalzell's character as a braggart is taken into consideration, can there be any doubt but what he would have explained, and have taken great pleasure in explaining in detail, to every person who would have listened to him, all about *his* GREAT invention, if he had any invention at that time? Many of his answers are filled with names of people, few of whom are known, who are, no doubt, if they live, scattered all over this country, to whom he says he exhibited crowns. Can it be conceived that the man whose appetite for bragging was such that his vanity was flattered by merely going around and exhibiting common articles of commerce, would have failed to plume himself as an inventor, failed to describe that invention, if he had any to describe? If Dalzell had had an invention then, the world would have known of it.)

Dalzell says, in answer 40, p. 20, that he explained his method to Dueber, viz: "I assured him (Dueber) that I could, explaining to him at that time the method and manufacture of the London maker, *also my own method*, showing the advantages of mine. . . ." In answer 161, p. 39, he says: ". . . describing perhaps the *modus operandi* of manufacture according to my method." This is alleged to have been said to some of those to whom he exhibited crowns.

Q. 167, p. 40, asks to which of the parties that he exhibited the crowns did he explain the way they were made. His answer in full is: "I gave to but one party;

not necessary to pluralize. To him I did not describe; to whom I described, I now fail to recollect. This refers to the very time that I produced the products; a few days later I gave some to Mr. Dueber, some slight idea of how the article was manufactured."

Q. 168. "If you described the process of making these crowns, core, or shell to any person, prior to your conversation with Mr. Dueber, just give the name of such person, and state what you told him."

A. "I can not say that I did, as I have previously stated, *I did not know how to go clearly about it, being a new article of manufacture. I was at a loss for terms to describe them*, merely telling them that they were struck up, and not going into any details."

X-Q. 169. "Well, to whom did you tell that they were struck up prior to your conversation with Dueber?"

A. "Mr. Butts, I think, as it was more than likely I should tell him, him being a machinist, and, as a rule, being very anxious to know how a thing was made. I might have told some others, but I can not tell who now."

This is the same Butts whose testimony I referred to a few pages back. Ante, pp. 19–20 et seq.

A. 207 to 215, pp. 46–7 et seq., describe in detail Dalzell's visit to Piper, primarily to show the latter his "samples," which, as he said, contained, among others, crowns, cores, and shells. The purpose of the visit, according to Dalzell, was merely to establish friendly relations with his future superintendent and shopmate; but, according to Piper, it was to ask for work in the Dueber factory. Piper, A. 76 to 82, pp. 306–7. An examination of the Piper testimony referred to will sufficiently indicate that I do not admit that there is any truth in the testimony of Dalzell last referred to; it is not referred to to prove the truth of any thing; but, merely, that Your Honors may have his own explanation for one of the peculiarities of his testimony, to wit; that although these inventions were completed, according to his own testimony, prior to his engagement by the Dueber Co., yet no man had been informed of them until the making of the tools had progressed at the Dueber factory.

But now, if Your Honors please, whether Dalzell called upon Piper to ask for a situation, as he undoubtedly did; or, called to establish friendly relations with the master mechanic of the shop where he was going to work, as he says, is it not a hard draft upon our credulity to ask us to believe that Dalzell showed crowns, cores, and shells to Mr. Piper in such stages of their manufacture, severally, as to indicate that they were made by some new method, for that is Dalzell's testimony, above referred to, and yet not vouchsafe any information as to how they were made, and that the only reason Dalzell can give for this peculiar state of facts is A. 215, p. 48. . . . "We were not holding an information bee." And when it is further stated that Mr. Piper, about a year prior thereto, had started a tool maker to make crown tools, in the Dueber factory, not differing much from those subsequently made by Dalzell, and had only suspended this work from press of other work, and want of room, and that he was, consequently, interested in the manufacture of crowns, the difficulty of believing Dalzell's tale is increased. Piper, 38 et seq., p. 301; Bradley, A. 8 et seq., p. 349.

His testimony from 216th to 225th answer, pp. 48 et seq., is upon this subject mainly, but it is neither explicit nor important; indeed, in view of his succeeding answers, to be quoted, it might, appropriately, be called by-play. The substance of it, moreover, is explicitly denied by Mr. Dueber, A. 97, p. 332, with whom the conversations were said to have taken place. I quote:

Dalzell, Q. 226, p. 50, "You have stated that there was a certain portion of your invention or inventions having reference to these crowns, that you did not explain to Mr. Dueber, or to any body else, for the reason that the article was new, and you did not have terms at your command to describe it. Will you please now describe what portion of this invention it was that you did not so describe, and if you desire, I will give you a copy of the patent sued upon in this case to enable you to point to the feature or features that you did not so describe."

Ans. "If you will refer to the specifications, they will more ably and clearly describe them than I can do it. I ask them to be exhibited for the gentleman's use."

Q. 227. "Counsel has examined the specifications, and believes he understands them; but the witness has stated in Answer 219 and other places in the record substantially as follows:"

"I did not fully describe the process of manufacturing them, as I have hereinbefore stated that I knew of no term at that time that would accurately describe or illustrate my process." What I desire the witness to do is to point to such portions upon his patents as he did not describe for want of terms and the patents are herewith offered to him for that purpose.

Ans. "I refer the gentleman to the claims I sued for, and procured Letters Patent upon; these claims are the ones that I did not describe in their entirety to any one."

Q. 228. "Letters Patent 329,284 are herewith shown to you, and you are asked if it contains the claims referred to in your last answer, and if it does, just state the numbers of the claims.

Ans. The numbers of the claims are printed on the specification, and are legible to be seen; I refer to all of the claims that I have in my five patents."

Q. 229. "Then you mean that you did not fully describe any of the inventions recited in any of the claims of either of your said patents, for want of terms to express them; is that correct?"

Ans. "I did describe as clearly as I could my claims to Mr. Whitney, upon which he drew up the specifications embodying my claims; to all others that I had any conversation with upon the matter previous to the procuring of my patents, I made general claims as to the simplicity and usefulness of my invention."

X-Q. 230. "Was Mr. Whitney the first person to whom you gave full and explicit explanations as to your machinery and processes; in other words as to your inventions?"

Ans. "He was."

In answers 238 to 240, pp. 52–3, a slightly different phase of the subject is touched upon. It is to the effect, when taken altogether, that he never exhibited the alleged crown tools to any body, and that he never divulged the fact of having crown tools to any body unless it was "to a party by the name of Ryan," and he "thinks" he told him that he had tools. It will be observed by reference to the context, that if there was dispute as to Dalzell's exact meaning here, it is doubtful if it could be successfully contended that Dalzell said he told Ryan that he had crown tools; his languege is: "I think I told him that I had tools." The context shows that at the time referred to Dalzell was selling certain other tools to the "party by the name of Ryan." In any event here was a clue, the only one furnished by Dalzell, to some testimony that Dalzell had, at the alleged time, said he had crown tools in his possession, if Dalzell's counsel had any faith whatever in Dalzell's statements. But the quality of their faith in him is evidenced by the fact that we have heard no more of the "party by the name of Ryan."

"I have now referred to, or quoted, all that Dalzell has said about communications of these inventions, or possession of crown tools, prior to the making of the crown tools in the Dueber factory, and will now assume that the record shows beyond a doubt that if Dalzell made these inventions before the time stated he never told it to mortal man.

I have also referred to all of his testimony that *throws any light* upon where his alleged crown tools were made.

There is much said in his deposition about certain tools, lathes, and engines that he had at his own house, that he pretends were used to enable him to do some of the work upon these crown tools, and when such lathes, etc., were procured by him. All testimony of this character has been so far omitted from the present review for two reasons: First, because if it were all true it would not explain the manufacture of these crown tools; that is, granting it to be true, still he *could not* then have made the crown tools in question; and, second, what he said upon these matters was obviously intended to distract attention from the essential difficulties of the story he was telling, and the record shows, as will be pointed out hereafter, that these statements, where they are not absurd, as many of them are, are too improbable to be worthy of credence.

From the above, with the testimony referred to, it is beyond question that whatever Dalzell did toward making the tools in question, prior to making the crown tools at the Dueber factory, he did either at the Queen City Sewing Machine Co.'s shop; at Robinson's shop; at Duhme's shop, or at his own home; for, it will be recollected, the above review of his testimony showed that nothing was done at the steel engraver's place—that the steel engraver had not the tools that Dalzell had first said he had—nor at Keene's place; for he only claims to have turned a lap there, Dal. 142, p. 36; and the only other place mentioned in this connection is that of Strathem and Price where he said he purchased materials entering into the construction of these tools—the testimony about which will be noticed in its order.

And 1st of the Queen City Sewing Machine shop. His statement of this place is that he worked there for three or four weeks in the fall of 1882. A. 146-7, p. 37. This period occurred after he left the employ of the Duhme Co., and immediately before going to work for the Dueber Co. He nowhere states what he did, or how much, at this place, toward making the crown tools; nor is there any thing in the record about what he did, other than his bare statement. Neither is it material. He states, A. 148-151, p. 37 (it has been before referred to), that he had presses and drop, or drop hammer, at Duhme's shop, and he does not say that there were any such tools at the sewing machine shop. Indeed, Your Honors will observe that a very large and the most important fraction of his cross-examination was dedicated to finding where he had the use of a double action press, and drop hammer, in making his tools; for the record shows, as will be pointed out hereafter, that the crown tools could not be made without the use of both.

Nowhere does he state that he had access to either of these tools, except at Duhme's shop. He insinuated once that he had access to a drop at the steel engraver's on Fifth street, but backed from that statement subsequently, to avoid being contradicted, as before pointed out.

But he has planted himself squarely on the position that he had the use of, and did use, a press and a drop at Duhme's, A. 148, and as he has not stated that either of them were to be found at the sewing-machine shop, it is, obviously, useless to pursue further inquiries about the latter.

WHAT HE DID AT ROBINSON'S SHOP.

Dalzell refers to his work at Robinson's shop and to conversations with Mr. Robinson in quite a number of answers, viz: 20, 23, 126–138, and in 245. The latter is the only one where he made any specific statement as to what he showed or told to Robinson, and we will quote it, pp. 54–5: "There might have been other parties, but I fail to remember just now whether I showed them the tools or told them of the tools, but I showed them the products, and to only one other do I *now remember of speaking of having the tools, and that was Mr. James Robinson*, the same Mr. Robinson referred to before. Mr. Robinson was doing some work for me at that time, that I showed him the crown and *spoke of the tools.* I told him of the profits that would occur in their manufacture. *He offered to give me the use of part of his factory and his machinery* that I might go into the thing and see what there was in it. I I told him that I would see Mr. Craddock, his partner, and we would all have a talk about the matter. *We had some such talk, and I concluded not to proceed* just then, as I needed funds for material and the support of my family, which I knew I could not get until some of the articles had been put upon the market, *they, Mr. Robinson and*

Craddock, only being willing to give shop room and the use of machinery."

I have italicised so much of the foregoing as states disputed facts, that Your Honors may compare it with the following:

Dalzell called this Mr. Robinson, and also Wm. F. Oliver, a workman in Robinson's employ at that time, to corroborate his, Dalzell's, statements; their testimony will be found at p. 110 and at p. 115 respectively.

Neither of these witnesses states that Dalzell had, or claimed to have, any crown tools; nor does it appear from their testimony that the subject of tools for making watch crowns was ever suggested by any one in any of the conversations referred to. There is no pretense that there was any drop or double-action press at Robinson's. Then wherein does this testimony eke out Dalzell's story?

Both Robinson and Oliver state that Dalzell exhibited to them, severally, watch crowns. But, as before intimated, wherever these watch crowns were made it is demonstrable they were not made by tools containing the disputed inventions.

It is admitted all over Dalzell's testimony that he had no such tools when he went to work for the Duhme Company, that prior to that time he had not access to a double-action press or drop—both of which were essential—or, as he puts it, his "inventions were in a crude shape." A. 148, p. 37. Oliver testified that Dalzell exhibited to him at noon time, while Dalzell was working with Robinson's tools, watch crowns. A. 6–9, p. 115. And in answer 15 he says this occurred in the fall of 1880. Dalzell commenced to work for Duhme in January, 1881, and continued there to the fall of 1882 (Dalzell's 24th A., p. 18); and he did not do any work at Robinson's shop while he was in the employ of the Duhme Co. Robinson's 41st A., p. 113.

Hence he exhibited these crowns to Oliver at a time prior to that when, as he says, he had any opportunity to make crown tools, and of course the crowns exhibited were some of his "samples" that he had picked up at the Marion Watch Factory or at Milne's, as before pointed out, or elsewhere in his travels.

Is not this a demonstration that Dalzell's exhibiting watch crowns to any one can have no tendency to prove that he had either an invention or watch crown tools?

Referring again to Dalzell's 245 A., quoted ante p. 31 it will now be understood that the relevant allegations stated therein by Dalzell are all falsehoods.

The first is that he spoke of the crown tools to Robinson. The short answer to that is, it is not true. In his answer 35, p. 113, Robinson says he did not ask how the crown was made, and Dalzell did not tell him. In answer 42, Robinson states that Dalzell led him to believe that he invented the *crown*. I will quote this answer for the purpose of remarking that the context *forbids* the idea that Dalzell meant that he invented the tools, or a method, but that the idea impressed upon Robinson was that Dalzell invented the crown itself:

Q. 42, p. 113. "Did Dalzell ever tell you about any invention he had ever made?"

A. "He showed me a ball that *he had invented the machinery for*. I was under the impression from the conversation he had with me *he also invented this crown*. These were the only two things he told me about."

Dalzell says in his answer under consideration: "He offered to give me the use of part of his factory and his machinery that I might go into the thing and see what there was in it." . . . "We had some talk. I concluded not to proceed." . . . "They, Mr. Robinson and Mr. Craddock, only being willing to give me shop room and the use of machinery."

Robinson's 22d A., p. 112, is: "He wanted us to go into the manufacture of them with him. I told him that it was out of our line of business, and I did not know any thing about the value of them or how many were used."

WHAT HE DID AT THE DUHME SHOP.

Dalzell's testimony as to what he did at the crown tools in Duhme's shop has been mostly referred to. It will be found in Dalzell's answers Nos. 23 to 25, p. 18, A. 127, p. 34 and 148 to 166, pp. 37 et seq.

It is, in short, that he had access to a press and drop there, and by means of these instrumentalities he did complete his crown tools. Wherever he refers to a press, he carefully says "press," never "double-action press." Under a subsequent heading, it will be shown *he could not commence* the making of crown core tools without having beside him not merely a double-action press, but he must have *the double-action press* in which such tools are to be used.

There was no double-action press at the Duhme shop.

Testimony of Emile Bady, A. 3 to 11, p. 411.

Testimony of L. Noelcke, Jr., A. 18 to 21, pp. 396 et seq.

There is not any dispute upon this fact in the record, and Dalzell's careful use of the word "press," A. 148, p. 37, without ever once saying "double-action press," in connection with the Duhme establishment, shows that he appreciated some of the difficulties that surrounded his story, although he was quite glib in distinguishing between single and double-action presses when speaking about the Dueber establishment. A. 57, 58, p. 23.

He also says, in the testimony referred to, that he had the use of a drop (sometimes called a drop-hammer in the testimony) at Duhme's, and that he used it to strike up his dies with; that he used it *for this purpose only at night*, and when there was no person present except the watchman. A. 149 and 157, pp. 37 et seq.

Dalzell called this watchman, Anton Kohl, to testify; that deposition will be found at p. 118; he there testified that Dalzell occasionally worked evenings in the Duhme shops at various kinds of work, which the witness specifies, A. 6; that sometimes he had a couple of men with him on such occasions, "but generally he was alone with a boy." A. 8, p. 118. He testified further that Dalzell struck up one or two dies, he is not sure which, which may have occupied one or two evenings, on the Duhme drop; that he did not know what those dies were for, except that they were "for our business." A. 6, 12 to 16; 31 to 39. Upon recall by our side, p. 429, this witness further testified that the boy who was with Dalzell when he worked in the evenings was Louis Noelcke, Jr., the son of the foreman of the Duhme Co.; that Dalzell only worked a couple of nights at the Duhme shop in the absence of L. Noelcke, Jr., and that these nights Dalzell worked upon his bench, and did not work upon the drop; and that Dalzell and L. Noelcke, Jr., always left the shop together. This deposition is so short that no laber would be saved Your Honors by referring to any particular parts of it. L. Noelcke, Jr., was called by appellee, p. 395. He testified that Dalzell struck up two dies, and only two, in the evenings; that one was for a lace pin, and while he thinks the other was for a sleeve button die, he is not certain what it was, A. 10 and 25; but he is sure that both dies were for Duhme & Co., A. 12, 26 et seq.; and is also sure that neither was a die for crown work.

This deposition is, I submit, conclusive that Dalzell never struck up a die for crown work in the Duhme establishment. The witness also testifies, contradicting Dalzell, that the latter was not paid $2.00 per week for overwork. *Vide* Dalzell's A. 155, p. 38. And it appears, too, that this witness had charge of all the tools in the Duhme shop, A. 42, pp. 398–9, and, being an apprentice under Dalzell to learn tool-making, A. 4, p. 395, he was quite intimate with the latter, so that, if Dalzell had any crown tools, or any new way of making crowns, or his mind was at all fixed upon the subject of crown making, this witness was in a position to know these things, or any of them. He states what tools Dalzell had with some particularity, A. 45, but he never saw a crown tool of any kind with Dalzell; nor did he ever hear Dalzell say aught that would indicate that he (Dalzell) had ever thought of the present inventions. A. 40–3. No statement that could be made of this deposition would be as effective or convincing as the simple honesty apparent upon the face of the testimony.

It will be recollected that Dalzell was at pains to say that no person was present when he worked in the evenings at Duhme's, except the watchman. I don't care to make extended comment upon this. If Dalzell's volunteering that statement, A. 155 to 157, p. 38, be not conclusive, under the circumstances, of the labored mendacity of his tale, nothing that I could say would add to its effectiveness.

And, it may be added, that although Dalzell has testified twice in the cause since the taking of Noelcke, Jr.'s, deposition, he has not attempted to contradict, or at all modify, the deposition of Noelcke. And see testimony of Galbreath, p. 296. Galbreath was the member of the Duhme firm who had charge of the shops. He says Dalzell did not make crowns or tools at Duhme's, and could not have made or experimented upon either without his knowledge.

I submit that in thus showing that Dalzell could not have made, and did not make these crown tools where he said he made them, that the underpinning has been knocked from his story; but he has ornamented this story with a few extras or ornaments, intended, no doubt, to add to its apparent probability, which I propose giving a little attention to before taking leave of this subject.

WHAT HE DID, HAD DONE, AND PURCHASED FROM STRATHEM AND PRICE.

Dalzell says, in his 127th answer, p. 34, " . . I then had forgings, and purchased steel from Strathem and Price. . ."

No farther light is thrown upon this by Dalzell, but Henry Price, of the above firm, was examined to corroborate Dalzell, p. 121. A word or two as to the value of Price's testimony. Price testified in chief, A. 10 and 11, that his firm made dies for Dalzell, and sold him round bar steel of various sizes during 1881 and 1882. During the cross examination it appeared that he had no recollection of the number, or kind, of dies that had been made for Dalzell, and relied upon a statement made by his bookkeeper to him immediately before coming to testify, for the general assertions that he had made. In short, that the only way he knew that his firm had made dies for Dalzell was because he had been told that the books showed it. Subsequently, he brought the books of the firm, relied upon by him, before the officer who copied the whole of the entry, A. 29, p. 123. They showed that two dies had been made for Dalzell, December 18th, 1882. These dies weighed respectively 15 pounds and 6 pounds—large rectangular blocks of steel. No die used in crown making would weigh more than an ounce or two. It was perfectly obvious that these had nothing to do with crown work, and were made for him after he left Duhme's, the only place where he pretended he had access to a drop. And these were the only dies he made for Dalzell, A. 31.

Dalzell's counsel then, *upon re-examination*, proceeded *to cross-examine* the witness as follows: P. 124, Q. 37. "Do you remember that when you were examined in the case at Newport, to which Mr. Moore has referred, you were asked with reference to these dies, this question: 'What were they for,' and that you answered 'I do not know, give me a pencil and I will make a diagram, we made some different shapes for him, made some different shapes, I made some square ones, some round ones, and I made some in this shape. I could give almost a dozen different shapes, that is as near as I can recollect.' "

A. "I answered I made this expression, I was making for Dalzell personally such as is given here in our account book, and others *paid for by Mr. Dueber*. That covers the dozen different shapes of dies I made."

It may be observed that the witness was called to testify by Dalzell in the criminal case, as well as in this. It did not appear by his testimony there, that all the dies made for Dalzell, except those large blocks of steel, were made for the Dueber Co. The testimony in the criminal case was upon the same point relied upon here by Dalzell, to-wit: that he had made crown tools before entering the Dueber employ. Thus, we see, that this witness, whether from carelessness or other motive, it is not necessary here to inquire, had so testified, in the criminal case, as to make it appear that the dies his firm had made for the

Dueber Co., years later, were made for Dalzell personally, and before the latter had entered the employ of the former.

The value of this witness' testimony being thus shown, it only remains to add that he further testifies that his firm sold some pieces of round bar steel to Dalzell. He has no recollection of how much, or of the sizes, and the only recollection he has of the time is that it may have been three months before, or three months after the making of the large dies, to wit: Dec. 18th, 1882, A. 35. That is between September 18, '82, and March 18th, '83. Dalzell left Duhme's during Sept., '82. (Noelcke's 3 A., p. 291) so that it is all but certain that if he bought any such steel at all, it was purchased while he worked for the Dueber Co. The books of Strathem and Price do not show any thing of these sales of steel, the witness relied for his testimony in this regard upon his "unaided memory." He "didn't think it necessary to charge such small items, we spend them for friends in a social drink." A. 34. Testimony of Henry Price, A. 11, 27, 28, 34, 35, pp. 122 et seq.

WHAT DALZELL DID AT HIS DWELLING-HOUSE.

We have now treated of every place where Dalzell has sworn that he did any thing toward the making of the tools in question, except where he calls "my own home."

Dalzell has testified in various places—if his counsel do not specifically call attention to these places, Your Honors will hardly deem it necessary to pursue the subject here, at least so it strikes me—that he had at his own home, to wit, a cottage of four rooms on Ann St., Newport, Ky., a swiss engine, a watchmaker's lathe, and a jeweler's stake, or small anvil, and hammers or sledges; that with the two former he made master tools, and with the anvil and sledge he made crowns, shells, and cores, after the dies were struck up at Duhme's. The statement that such articles as these master tools *could* be made with the swiss engine, and the ordinary watchmaker's lathe is based upon the assumption that counsel and the court are so ignorant of the delicate character of these tools, relatively to the work said to be done upon them, that they will believe it without criticism; or, it may be, that Dalzell's faith in robustious swearing gave him the confidence requisite to make the statement.

A prior portion of this brief, ante pp. 16 et seq., is dedicated to showing that Dalzell did not bring any crown tools into the Dueber factory. The testimony there referred to sufficiently shows, I think, that Dalzell had no tools at his house. In addition to the testimony of Dalzell, and his brother Rudolph, the other side offer the testimony of Charles Penkawa in support of the proposition that Dalzell had crown tools at his house before he made any at the Dueber factory, vide p. 125.

This deposition is lengthy, and will repay analysis. In the direct, he speaks positively of tools that Dalzell showed to him at his, Dalzell's, house during the second week of Dalzell's employment at the Dueber factory. The witness did not call them crown tools, or say what they were for; but, in answer to the leading question (23) as to whether they were similar to the Exhibits Dalzell's Models of Tools, he answered yes. This is repeated so often and so variously in the direct examination as to convey the impression, to the casual reader, that the witness intended to testify that the tools were crown tools. He did intend to say that Dalzell exhibited to him a box containing two smaller boxes, one of these smaller boxes containing samples of jewelry, watch crowns, etc., and made of gold and other metals. The other small box contained the tools referred to. The witness saw these tools about dusk and before the lamps were lit. A. 93, 94. He had none of the tools in his hand. A. 95. He does not know whether any of the tools that he saw were crown tools. A. 144–5. He does not know the purpose or use of any of the tools that he then saw. A. 143. He saw the box containing the tools "but a short time, not very long; it was about ten minutes." A. 155.

As this estimate of time was made more than five years after the event, is it not likely that one minute would more accurately represent the interval? Not only was it near dark, but the witness sat at a distance of "between twelve and thirteen feet" from where this box was. A. 85–89. Dalzell did not then tell the witness that these tools were crown tools, A. 145; nor did he, Dalzell, then say that he had made the tools, and indeed did not refer to them at all. A. 159. The witness did not then notice either the size or *shape* of the tools in question, or whether they were corrugated on the end. A. 158. He does not know whether the tools seen at Dalzell's house were "an inch or two shorter or longer than the tools Dalzell's models." A. 157. And the tools were not removed from the box while the witness was in the room with them. A. 175. Witness went to Dalzell's house to see how good a workman Dalzell was: "His samples satisfied me. That was all I looked at. That was what he called me there for." A. 162.

In his direct answer 23, before referred to, he answers that leading question that the tools he saw at Dalzell's were "similar" to the Exhibits Dalzell models with a "Yes, sir;" but when the witness was first brought to the room, where he subsequently testified, and was shown the Dalzell models of tools, he was asked if they were "similar" to the one's he had seen at Dalzell's house, but his answer then differed materially from his latter answer, viz: "I told them they looked something like it." A. 134–5.

It appears, from a volunteer statement of the witness, that he was discharged by the Dueber Co., A. 77, and that Dalzell consoled and sympathized with him about it. A. 167–70. Dalzell showed these tools, according to this witness, in his middle room, which he calls a sitting room. A. 57 et seq., and A. 65 et seq. It will be observed, in the testimony referred to, that he saw no bed in that or any other room of the house. There can not be any mistake—has been no dispute thus far—but that this second or middle room was the bed room. Stricker: A. 84, p.

376; and A. 116–121, p. 378. This last is pretty conclusive of the bed.

If it be said that the witness Penkawa was more likely to recollect, during this interval of five and a half years, the tool exhibit than the bed in the room, I ask wherefore? Testimony, referred to above, shows that the little box, said to contain the tools, was not removed from the large box during the interview; that no person put a hand upon the tools—at least it does not appear that any one did—that no word *was said by any one* about the tools; that the room was nearly dark, and the witness sat twelve or thirteen feet away from the tool box, so that absolutely nothing occurred to give emphasis or even to draw attention to the existence of this tool box or these tools, and yet this witness who sat in the room ten (?) minutes and did not see a bed in it, not only saw these tools but saw that, for whatever purpose they were intended, they were male and female, and that they were rusty.

This witness is the only one, and many of them were in the house, who pretended he saw a box with tools of any kind in it in Dalzell's house. He describes it as being of considerable size—three feet long, one foot high, etc. A. 19. It sat on the floor beside the bureau, and "you could look right over their and see it." A. 61–64. And yet, occupying so prominent a place in this room, no other witness of the many who have testified to being in Dalzell's house saw it!!!

Rudolph Dalzell had testified that he had seen Allan *place part of the crown tools in a box*, and he had carried that box to the Dueber factory, A. 27–31, p. 104.

Penkawa, when the case is about closed, attempts to brace that up. His effort bears the impress of patch-work. Rudolph saw part of the crown tools being placed in a box for him to carry; Penkawa, a casual visitor, saw *the tools* in the box—evidently their permanent location.

If this deposition be the result of coaching as I think, it is difficult to escape the conviction that Penkawa voluntarily consented to be coached.

This appears to be an appropriate place to refer to the deposition of Charles Merz, p. 138.

This witness stands alone in saying that Dalzell told him, when he, Dalzell, first went to Duhme's, how he proposed to make "watch pushes," and make them cheaper, than they were being made. But there was nothing new about the mode then described. His mode of making the core was by turning it in a lathe, A. 18 p. 140. An effort was made, Q. 20, to get the witness to be a little less definite about this; but it was a failure; the witness insisting that he had given the exact words of Dalzell—that the core was to be turned upon a lathe. It is only necessary to say that the merit supposed to exist in the Dalzell inventions consisted, essentially, in the fact that the cores were to be struck in a die, as distinguished from turning them on lathes. This is appellant's witness; his testimony is not affected by any thing else in the record, and I submit *this testimony alone* ought to be conclusive against all of Dalzell's pretenses.

DALZELL DID NOT MAKE THE CROWNS THAT HE EXHIBITED?

Assuming the proof already reviewed conclusive that Dalzell did not make, and did not have, crown tools when he entered the employ of the Dueber Co., it would appear to be a work of supererogation to point out that he did not make the crowns that he exhibited to some of the witnesses. But while he did not tell any of these witnesses, that he made them, he does testify in this cause that he made them; and, if the record furnishes satisfactory evidence, independently of the testimony about the tools, that Dalzell intentionally and deliberately falsified about this matter also, it ought, I think, to be taken in itself as conclusive of the falsity of his entire story. Dalzell testified, A. 162–167, p. 39, that he did by "the aid of a sledge hammer and a tolerably well developed muscle," strike up crowns at his own house, and on an anvil in the Duhme establishment.

The following testimony of experts, *i. e.* practical mechanics who are familiar with the construction of these crowns, and of the machinery necessary to produce them, is to the effect that, even if it be assumed, for the purpose of the argument, that Dalzell had, at time referred to, full sets of crown tools, still he could not have made crowns by the instrumentalities he describes; and more particularly, that the cores could not be made without the use, not only of *a* double-action press, but could not be made without the use of *the* double-action press that the crown tools *must have been made for and adapted to.*

Piper, A. 61–69, pp. 304–5.

Dueber, A. 25–6, p. 324; A. 222–225, p. 343.

Bradley, A. 50–56, pp. 353–4.

Subsequently to the taking of the above testimony Dalzell again took the stand, and, while on the stand, to demonstrate the unsoundness of the above opinions, he proceeded to and did make a crown. His testimony upon this matter will be found in A. 5, p. 167, and A. 22 to 44 inc., pp. 170–73. This testimony will enable Your Honors to clearly understand the trick attempted.

One of the tools used by Dalzell was a double-action press; that is, the effective part of such a press. It was taken out of one of the double-action presses used by the Fahys Co. to make these crowns. Counsel for Dalzell refused to permit this tool to be made an exhibit in the cause, p. 172. But we can do without it. It is shown in "Respondent's Exhibit, Dalzell Patent No. 1," and its function *honestly* described in a still later deposition of Mr. Bradley, A. 16–18, p. 513.

Dalzell brazenly insisted, in his last above referred to testimony, that in making the crowns that he testified to making at Duhme's, and at his "own home," he had used just such a tool as this, A. 41, p. 172; and this, notwithstanding the clear demonstration which this record furnishes, that he never had access to a double-action press in Cincinnati until he went to work for the Dueber Co. Whereupon, lest I should, possibly, have overlooked some of his prior testimony upon this matter, and in a spirit of absolute fairness, I put the following questions to him: P. 172, Cr. Q. 42: "Were these tools which you say were similar to the tools referred to, your own; if so, when and where and from whom did you get them?"

A. "In my former testimony I told you where I made them, how I made them, where I operated them, how I operated them, and all about them. I don't think you will be able to get any further information on the point."

Cr. Q. 43. "Is it because your former testimony was so explicit upon this matter that you decline to give further information now as to where you procured or made these tools?"

A. "I think my former testimony is sufficiently explicit. I *could not* give you any further information *were I desirous of doing so.*"

This last sentence is true anyway! It is further submitted that the use of this double-action press tool by Dalzell in making the crown is as distinct an admission as could be made that a crown could not be made in accordance with the Dalzell method without the use of a double-action press; and, further, that his refusal, in his testimony last quoted, to attempt to give the information there sought was just as distinct an admission, not only that he had had no such tool, but that his ingenuity in tergiversation had been exhausted.

In addition to this confirmation of the soundness of the opinions of Messrs. Piper, Dueber and Bradley, above referred to, it has also to be stated that Dalzell broke one of the forces while making ONE crown, A. 44, p. 173.

Proof, hereinbefore pointed out, that Dalzell exhibited crowns among his other "samples," before the time he claimed to have made any crown tools, ought to have sufficiently illustrated the absence of significence in Dalzell's exhibitions of crowns, but it is respectfully submitted that the proof now offered should eradicate the last vestige of doubt about Dalzell's pretensions to having made crowns, or crown tools, before he entered the Dueber factory.

DALZELL ADMITS, AND PLEADS GUILTY.

There is one cogent piece of evidence in the record that, properly considered, might, indeed, be taken as a substitute for the balance of it. I refer to "Resp'dt's Exhibit Dalzell Indictment," printed at pp. 477–80.

A few words upon this:

Dalzell, A. 400–412, pp. 78–80, with well simulated indignation, states that the crown tools "Compl't's Exhibit Dalzell Models of Tools, Nos. 1 to 16," then present, were the tools, or a part of them, that Dalzell made before coming to work for the Dueber Co.; that had been carried by his brother Rudolph to said factory; and for the stealing of which he had been indicted in Campbell Co., Ky. The characteristic mud that Dalzell in his fine frenzy here throws at the president of the Dueber Co. I shall not notice, further than to prophecy that, by the time Your Honors have traveled so much of this case, you will have so learned the real character of Dalzell as to know that his venom is harmless.

A reference to the indictment will show that Dalzell and his confederates were charged with stealing five sets of crown tools, and many other tools, crown tools and others, and samples of crowns.

It further appears that, on the second day of the trial, p. 479, *Dalzell moved* the court, with the consent of the commonwealth, that the swearing of the jury be set aside, and the indictment with reference to the confederates of Dalzell be discontinued; and Dalzell, by consent, plead guilty to a trespass, and submitted the cause for trial by the court without the intervention of a jury; whereupon Dalzell was fined $100.00 and the costs of the prosecution.

Dalzell says the charge against him was the stealing of the tools, at present exhibits in the cause. A. 402, p. 78. It is the fact, as the indictment shows, but it is not now necessary to dwell upon it, that the exhibits are but a small fraction of the tools actually stolen. Suffice it to say, that Dalzell did plead guilty to a trespass in taking those tools. If they were his own tools, would he have been guilty of a trespass in taking them? Or would he, surrounded by very able counsel, as he was, have plead guilty of a trespass? It is hardly necessary to say here, that this indictment has not been made an exhibit, nor have I commented upon it for the purpose of showing Dalzell to be a thief. My sole purpose has been, and is, to show that Dalzell admitted that the disputed tools were, and are, the property of the Dueber Co., and this notwithstanding the characteristic cuteness of Dalzell in getting possession of them after the trial, when no person else was particularly thinking of them.

Does not this pleading guilty carry with it the admission that he had no crown tools when he went to the Dueber Co., and that he could not, and did not, make any crowns before that time?

Inasmuch as Dalzell's principal reliance to rebut the evidence of the Dueber Co. of him being directly charged for all the expense of getting out the patents, and it charging such moneys, when paid, directly into its expense account, together with the whole course of conduct of the parties in relation to this matter, from the time Dalzell asked Mr. Dueber to have the inventions patented until he ran away, carrying with him the tools, and, as he supposed, all the skilled workmen in that department, to a rival manufacturer, was his ability to make it appear that he made these inventions before he went into the employ of the Dueber Co., and his alleged prior possession of these tools the means relied upon to attain that end, is not this *pleading guilty*, I repeat, so full a confession of the whole infernal plot as to justify the assertion that Dalzell's organization is so radically crooked that he is incapable of an honest act or a truthful statement?

In passing it may be stated that, irrespective of this indictment, and proceedings under it, the record contains full, specific, and *uncontradicted* proof that Dalzell did steal the crown tools, or carried them away by stealth, if that be the preferable way of stating it, viz:

Testimony, Henry Stecht, A. 35–45, p. 402.
Testimony, George Cook, A. 28–34, pp. 389–90.

The testimony of Stecht, A. 11–21, p. 400, in addition to showing what it is referred to for, also shows, what has been above asserted, that it was the intention of Dalzell and his confederates in leaving not merely to steal the patents and serviceable crown tools, but they also aimed to demoralize and, if possible, destroy the crown department.

Testimony of Bradley, A. 41–43, p. 352.

Testimony of John Price, A. 11–13, p. 419; A. 160–1; pp. 429–30.

While referring to John Price, I ought to state what Your Honors will easily see when you read his depositions, as I hope you will, as it is doubtful if there be more important depositions in the record, that he is a simple-minded youth, who, although he worked in the crown department, before Dalzell left the Dueber factory, was not one of the conspirators, but was, by them, tempted to leave the factory with them; and, subsequently, when their dirty work was discovered, they tried to blacken his character and fasten their work on him. Indeed, it appears by the testimony of Dalzell and Carpenter that they went so far in this business, and in their efforts to intimidate Price, that they had him indicted, somewhere in N. Y. state, for perjury in stating, in an affidavit, in proceedings for the extradition of Dalzell, that Dalzell had stolen the Dueber crown tools. They had more prudence, however, than to attempt to have him arrested.

CRITCHLEY'S DEPOSITION.

This appears to be an appropriate place to draw attention to this deposition, which is a unique feature of the case.

Critchley was one of Dalzell's confederates, and the whole case, read between the lines, shows him to have been the most trusted, because the ablest of them. He was indicted with Dalzell. Dal. Indictment, p. 477.

His deposition is at page 482 et seq.

As will be observed, from the position of his deposition, our testimony was nearly completed before we learned that Critchley was willing to testify. This deposition is so important that I must presume Your Honors will have read the whole of it.

Notwithstanding the great intimacy apparent between this witness and Dalzell, he, Critchley, never heard Dalzell speak of having invented crown tools of any kind prior to his, Dalzell's, employment by the Dueber Co. A. 37. He says he can safely say that he made ten of the tools, at the Dueber factory while he was working for the Dueber Co., that Dalzell claims to have made and brought into the factory; that he was indicted for stealing, and that are now marked as Exhibits "Models" of tools in this cause; that is, that he made at least ten of them. A. 8 to 15. He says, too, contradicting Dalzell, and supporting Bradley, Piper, and Dueber, that these tools were not models, and could not, in their present state, be used as models, but that they are unfinished tools. A. 15, 26, 58 to 63. Critchley says, too, that he advised Dalzell to "procure his own counsel in preference to Mr. Dueber's." A. 129, p. 494.

These things, and many others of similar import that he says, must now, however, be too clear to require further support.

The most important statement that he makes is that he was compelled, by moral force, to make an affidavit utterly misrepresenting the facts disputed in this case. A. 27–36, 68–77, 92–100, 130–132.

It appears by the referred to testimony that Critchley wrote a "statement," and that from that statement one Carpenter, an atty. at Sag Harbor, drew an affidavit for Critchley to sign, and that this affidavit was made to harmonize with other affidavits drawn at the same time for the other confederates: Butts, Naul, Pfeifer, and the two Dalzell's to swear to. *At the time of the taking of Critchley's deposition, be it noted, counsel for the Dueber Co. did not know that Critchley or the others had sworn to more than one affidavit each.*

A paper was shown, upon cross-examination, to

Critchley, which he recognized as the "statement" furnished to "Carpenter." This is printed at p. 495.

Then an affidavit was presented to him, which he also recognized as being his affidavit. A. 75–77. It is printed at p. 496. The dates of these two papers were, respectively, March 26, 1886, and May 12, 1886.

Critchley had testified that the affidavit had been doctored by the attorney, Carpenter, and made to harmonize with a pre-arranged story. The affidavit offered in evidence, by Dalzell's counsel, as *the* affidavit written after and upon "Critchley's statement," of March 26, 1886, is an absolute stranger to the "Critchley statement," is indeed, upon a different phase of the subject, for a different purpose and made at a different time. Critchley, when recognizing the affidavit offered to him by counsel for Dalzell, upon his cross-examination, as *the* affidavit, had evidently forgotten that he had made several different affidavits; the affidavit shown him, and printed in our record, was recognized by him as genuine, and this, no doubt, he intended to say, but, under the lead of Dalzell's counsel, he stated more, to wit: that it was *the* affidavit drawn by Carpenter, upon the Critchley statement. This will explain why the affidavit printed does not contain the statements that Critchley had said it contained.

Dalzell's counsel obtained leave to take further testimony for the purpose of contradicting Critchley, and for this purpose examined the Sag Harbor attorney, Carpenter, Henry Cook, of the Fahys Company, and Dalzell.

I shall limit my remarks to Carpenter, p. 193. From his deposition, we learn that he drew four several affidavits for Critchley, all of which were sworn to, and one, or more, for each of the other confederates, who also swore to theirs; and that the affidavit that Critchley identified was the fourth affidavit that he had made upon this Dalzell tool-stealing business, and was made as a basis for an application for a search-warrant, and had nothing to do with the "Critchley statement." While Carpenter was under examination, a paper purporting to be a copy of Critchley's first affidavit was made an exhibit. But why was not this offered to Critchley for identification at same time the "statement" upon which it was based was offered?

The second and third affidavits made by Critchley were not produced or offered. Why? Carpenter's seventh (second, so marked) question and answer are as follows, p. 194:

"Have you now mentioned all the affidavits made by Mr. Critchley before you or with which you had any thing to do?"

A. "According to my best recollection, I have. I think I have mentioned four. *I have not stated any of the conversation between Critchley and myself at the time one of the affidavits was made. It was the second of the series. It was the affidavit that was made next after the affidavit of March 26th.*"

It will be observed that this witness was itching to tell this conversation. He was permitted by the next question to state it. He then goes on and makes a statement, purporting to be a repetition of what Critchley had said two years and seven months prior thereto, and in it he repeats, almost verbatim, a story told by all the Dalzell conspirators upon every opportunity that any of them had, after this game of affidavit making, to the general effect that Dalzell was an innocent lamb, and any stealing that was done had been done by the witness John Price.

Carpenter *volunteers* the statement, in his fifth answer, that he had not thought of this matter "for more than a year." Queer that his recollection should be so accurate!

The affidavit that was drawn for Critchley, after he made the oral statement that Carpenter charges him with, has not been produced. Why? Can there be any doubt that this missing affidavit contained not only what Carpenter says Critchley stated orally, but also the things that Critchley stated Carpenter had put into the several affidavits of the conspirators to make them harmoniously agree that Dalzell was the innocent victim and poor Price the arch thief?

Why was Carpenter so anxious for permission to make this statement, unless to forestall the possible production of his handiwork in the missing affidavit?

If Your Honors please, it is not for the probative force of this Critchley testimony that it was introduced. The matter of the making and stealing of these tools was clear enough without it. Neither do I care any thing for the efforts to contradict Critchley. It was not to be expected that the crowd that, by perjury, had poor Price indicted for perjury would hesitate to destroy, if possible, any body who told the truth. The curious thing, indeed, to the uninitiated, is that they limit themselves merely to contradicting him—throw no more dirt at him than is necessary for that purpose. The initiated know the reason for this, and, I venture to submit, that a careful reading of his deposition will sufficiently suggest it.

Is it not apparent upon the face of Critchley's deposition, that he did not, dared not, tell all he knew?]

Is it not within the limits of the probable that the Dalzell crowd hesitated before making a direct onslaught on Critchley, lest he might be forced to open his yet concealed batteries upon them? Is not this careful treatment of Critchley touched in "fine shades" in Dalzell's later deposition—that replying to Critchley? pp. 201–2.

It is the fact of this affidavit making by these conspirators that I wished to throw into relief.

Carpenter does his best to shield the Fahys company from any participation in this business. Henry F. Cook had the good taste to deny knowledge of it. I wish I could see my way to speak in a similar tone of his honesty in making such denial.

Carpenter tells an explanatory tale, in his cross-examination, as to motives and object in taking these affidavits the details of which I will not inflict upon the court.

His animus is concisely stated by himself in his 35th A., p. 198, where he said, he wished that John Price had been arrested.

Generally stated, his explanation is that each of these confederates desired his own affidavit to be taken, and that he expected each to pay for the drafting of his own, except Critchley's first affidavit, which he expected Dalzell to pay for, as the latter first spoke to him about drawing that affidavit; that he had not yet been paid for his services in doing this work; that he made no charge for it in any of his books of account, but expected, as before stated, without having any contract to that effect, that each would pay for his own; and that the affidavits were drawn to be sent to the prosecuting attorney of Campbell Co., Ky., "to show him, as the prosecuting officer of that county, the utter flimsiness of that charge." A. 42, p. 198.

Is it possible that reputable counsel will stand before this court and state they would take the word of such a witness as this atty. Carpenter has shown himself to be when he states and swears to it, that this movement to take these affidavits was not a concerted movement; was not for the purpose of fixing up a set of falsehoods to be sworn to by each of the confederates, that Dalzell, and the others, might be acquitted of the charge of grand larceny; and the Fahys Co. likewise acquitted of the reputation of aiding and abetting thieves, and profiting by their theft, and all for the purpose of injuring a successful rival in business?

As I take leave of this Critchley testimony, I ask, with great deference, is stronger proof conceivable of the fact that these men were engaged in a dishonest conspiracy than is found in the making of these affidavits, and that regardless of the statements contained in them?

THE EXHIBITS "DALZELL'S MODELS OF TOOLS," FURNISH TWO APPARENTLY SMALL, BUT REALLY INDUBITABLE PIECES OF EVIDENCE AS TO WHERE THOSE CROWN TOOLS WERE MADE.

1st. Your Honors will observe that Exhibit No. 6 shows the little round spot, upon the end of the operative part of the tool, somewhat larger than it is shown upon any other of those tools, that is, larger than it is upon any of the tools that have this character of spot, for Exhibits 8, 9 and 10, according to my present recollection, are intended to make a different kind of crown.

No. 6 represents the size of this spot upon the tools intended to be made, and commenced by Bradley, under the superintendence of Piper, before the advent of Dalzell to the Dueber factory. It also represents the size of the spot upon the first crown tools made by Dalzell. The first crowns, made by tools having this size of spot, were silver, and upon these it worked all right. Silver crowns are made solid, and of course, there is nothing to polish through. After making silver crowns with those dies, they commenced to make gold crowns. Gold crowns, generally, are not made of solid gold. The outer film, shell it is called, is made of gold. This surrounds a piece of base metal called the core. In lapping or giving an even flat surface, to this small spot, which is done by holding the crown at right angles to a revolving disk, with this spot flat against the vertical face of this disk or lap, the thin gold of which the shell is made was polished through in many of the crowns. So slight was this exposure of the base metal, that it was not discovered until after many cases, having these polished through crowns, had been sent from the factory to dealers, when exposure to the atmosphere, after the brightness of the polish had somewhat faded, exposed the base metal. Such cases were of course returned to the factory, and prompted inquiry as to the cause, which Mr. Dueber soon discovered while examining a tray, or case, of new crowns. Whereupon new tools were made in which this small spot was reduced in size, so that less gold would be required to be cut off during the lapping process.

Dueber's 55th to 61st A., pp. 327–8, and 123d A., p. 336.
Detmering's 2d to 14th A., pp. 505–6 et seq.
Price's 15th to 20th A., pp. 516–7.
Bradley's 22d A., p. 351, and 64th A., p. 355.

All crown tools among the Dalzell exhibits—except Nos. 8, 9, and 10, and of them presently—have this small spot—and except No. 6 of course—and were all made at the Dueber factory after June, and, it may be, after July, 1884.

And yet the Dalzell conspirators saw those tools with Dalzell before he entered the Dueber employ!!

As stated before, this is one of the small things likely to be overlooked in concocting a tale; indeed, it is impossible, even for the wisest, not to overlook some such things when making an effort to counterfeit or misrepresent the natural order of events. But could such evidence, as I have above referred to, be simulated?

What reply have the other side to make to this? They offer the testimony of an expert lapper, Leonard, to prove that it requires less skill to lap a large surface than a small one. But that is not the point. It is that the larger the surface to be lapped, the longer or larger the waves of irregularity on its surface will be, and the deeper cut will be necessary to reduce it to an absolute plain. *Vide* A. 47, Brown's testimony, p. 510.

But I apprehend that, in view of the testimony referred to as to the fact of the change, Your Honors will not trouble yourselves much about expert's theories.

2d. Among these "Dalzell Exhibits," there are three, Nos. 8, 9, and 10, for a differently formed crown. No crowns of this character had ever been made, at least up to October, 1887, the last time testimony was taken upon this point, from any person connected with the Dueber establishment. Dueber's testimony is, A. 201, p. 342, that he instructed Dalzell to have such tools made just before, or about, the time Piper left the factory. Piper left the factory July 1, 1885, Piper's testimony, A. 2, p. 298. But the tools were not made until after Piper left—indeed, they had not been finished in October, 1887. Critchley made the tools, so far as they were made, under the supervision of Dalzell, from a crown furnished by Dueber to Dalzell.

Testimony of Dueber, A. 18 to 21, p. 323; A. 126, p. 336.

Testimony of Critchley, A. 23 to 25, p. 484; A. 64 to 67, p. 489.

And yet these Nos. 8, 9, and 10 were tools, or, according to Dalzell, "models," that he had when he came to the Dueber factory!!

I can not resist the temptation, wanting in significance as every thing that he has said must appear by this time, to refer to Dalzell's testimony upon these tools. It was while he was engaged in contradicting Critchley with great delicacy. He had answered that Critchley did not make any of the *ten*, *at least*, that he had testified to making, in the Dueber factory, of the "Dalzell models" when the following occurred, p. 202.

Q. 6. "Do you remember certain of these tools intended to make a special crown, flat on the top, with straight sides, and corrugated around the outside?"

A. "Only so far as I have models for such tools, which I have undoubtedly shown to Mr. Critchley. That is as far as he has seen any thing pertaining to these tools."

And this is all the contradiction or explanation of this testimony that Dalzell felt able to give.

THE CONSPIRACY.

The proof in the records might not be sufficient to secure a conviction, if these men were being tried under an indictment for conspiracy; but, when taken together, it is sufficient, as I submit, for the purposes of the present cause.

1st. A reference to Dalzell's prevarications and contradictions when describing his first interviews with Mr. Dueber, about employing a solicitor and getting money to pay for getting out the patents, Ante, pp. 10 et seq., leaves an impression upon the mind of the reader, not merely of want of candor, but that there is something held back; that something not yet told is necessary before his then motives, or the surrounding circumstances, can be understood. The testimony of Critchley throws a flood of light upon this. I refer to his 127th, 128th, and 129th answers, pp. 493–4.

It will be observed upon reading this testimony of Critchley that he had no appetite for saying what he did; that he said just as little as he could; that he volunteered nothing; and that what he did say was pumped out of him, so to speak. What he said furnished good reasons for reserve upon his part. Upon the other hand, it does not require either a large knowledge of human nature or very extensive observation to know that a man situated as he then was could be relied upon to tell the truth. When a man, admitting that he has been guilty of a crooked course of conduct, asks for an opportunity to undo the evil that he has aided in doing; an opportunity to show that his past dishonesty was more the result of the evil influences surrounding him than of his natural bent, an opportunity, in short, to recover lost reputation, his pride may still fight to prevent further disclosure, but, under these circumstances, such a man, *having the courage to take the witness stand*, WILL tell the truth!

Is it not clear from this testimony that Dalzell first suggested to Dueber the scheme of patenting these inventions? that Dueber agreed, after being importuned so to do by Dalzell, to go to the expense of patenting them, and that it was the result of management, upon the part of Dalzell, that Dueber acquiesced in permitting him to get his own solicitor? The anxiety of both of these men that Dalzell "should procure his own counsel in preference to Mr. Dueber's" is too apparent here for doubt. Now, why was Dalzell so anxious to have his own counsel, unless upon the presumption that he expected to do things that he did not wish Mr. Dueber to know of?

Upon the presumption that these patents, after Dueber should have been at the expense of obtaining them, were to be the property of Dalzell, or that Mr. Dueber was to pay him a further sum for them, there could have been no ground for underhand work, or scheming, upon the part of the confederates, and whether the solicitor was Dalzell's, or Dueber's selection the facts could, and naturally would, have been stated to him before he proceeded with his work. But if, upon the contrary, the patents *were to be Dueber's until they were paid for*, and then to be Dalzell's, it was, obviously, important that the solicitor, who should make out the bills against the Dueber Co., and should have the patents issue to Dalzell, should be the latter's "own counsel in preference to Mr. Dueber's." It ought to be said here that the patents were, by the contract, to be the property of the Dueber Co. or that of Dalzell; there is no middle ground possible. Dalzell insinuates it (only) that the Dueber Co. were to pay him a further sum in addition to that of procuring the patents. There is no suggestion of a liquidated sum in this testimony. The insinuation of Dalzell is of a sum *to be liquidated.* In such a case, it goes without saying, that the patents would be the property of Dalzell, unless the Dueber Co. gave such a sum as Dalzell might ask!

I will not remark upon the dense stupidity imputed to the president of the Dueber Co. by this insinuation.

2ND. WHITNEY-DALZELL CORRESPONDENCE.

A portion of the private correspondence between Dalzell and Whitney is in the case, pp. 202–8 and pp. 214–21; but it is evident, upon reading it, either that part of the correspondence has not been discovered; or, what is still more likely, important communications were usually made orally when they met. Still there is enough in it to point out with reasonable certainty that while Whitney, "Dalzell's own counsel," was not treated with absolute confidence he had an understanding that there was dirty work to be done, and that he was expected to do his share of it, as the occasion for his acting arose, and that too without asking awkward questions; and it is evident, too, that he acquiesced in this view of his functions; and there is enough in it, I submit, to show that there was a conspiracy to steal these patents. This correspondence is not printed in chronological order. Under date of July 11, 1885, Whitney wrote Dalzell (p. 219):

". . . Have been waiting for the assignments which I sent to Mr. Dueber before sending the final fees in the cases. Has he said any thing in regard to them? In the assignments there is a clause asking the Commissioner to issue the letters patent to the D. W. C. Co. as assignee of your interests, therefore can not send fees until this is settled. However, there is no especial hurry, and if you like I can wait and send fees for all the cases at the same time, which I believe would be best, as then all six cases would run the same length of time and expire simultaneously. This, of course, rests with you, and you can delay the matter as you desire. . . ."

It appears by the three exhibits, upon pages 245–6 that the Dueber Co. sent their check, on the 24th of June, for $120.00, being the final fees in the six cases; and Whitney receipted for the same on the 27th inst.; so that, when Whitney wrote the letter of July 11th to Dalzell, he had had the Dueber money in his possession about two weeks.

On July 24th, following, Dalzell answered Whitney's, of the 11th inst., p. 206, viz: "Mr. Whitney—My Dear Sir: You must excuse me for not answering your kindly letter of the 11th. *I thank you for the hint you gave me about the assignment papers.* I have not come to any understanding with the firm as yet, but hope to have the thing settled soon. . . ."

"P. S.—*If there is any thing you would advise me to do, please write and let me know how to act.*"

On Aug. 4th, following, Whitney writes Dalzell, in answer to the latter's letter of July 24th, p. 220. In it he says: ". . . In regard to the assignment business, I would not hurry the people, Mr. Dueber, or appear anxious; he will approach you and it will be arranged with better terms. . . ."

Neither the "understanding" spoken of by Dalzell, in his letter of July 24th, nor the "arrangement" referred to in Whitney's, just quoted, can be certainly and accurately understood by any thing in the contexts. These terms obviously refer to prior conversations between these men, the exact character of which they did not have the courage to write about.

Under the same date, Dalzell writes Whitney, p. 207: "Mr. Whitney—My Dear Sir: Your favor of the 3d has just come to hand, and I thank you for your kindly interest in me; and if you can further my interest with the Waltham Company through your cousin, I shall feel ever grateful to you. Their agent in Cincinnati thinks that the company would only be too glad to go into the thing, and wishes to open the way for me; but, if you would write your cousin, explaining to him all about the pinion and all the other things, you having such a thorough knowledge of them, the advantage to a company such as the Waltham in having my patents would give them the prestige over all others, they being manufacturers of both the movement and case; their method of making the pinions of all kinds can be superseded at one-tenth of the present cost and with better results. I can furnish them with all the crowns they use at one-fifth of their present cost. This matter I will leave to you. If you will look after it, I know that it will be in good hands. Whatever you want, in the way of samples or information, let me know. *Mr. Whitney, let this be in confidence, as it will be to our mutual benefit.* Mr. Whitney, the firm have asked me to sign the papers—*they said nothing about compensation*—but I refused. They then said they would come to an understanding, but have said nothing since about it; they then said they would do the right thing with me, but time is rolling on, and *they are making thousands of dollars and I am making nothing.* . . ."

Prior portions of this correspondence showed that Dalzell was trying to dicker with the Waltham Co., to sell or license them under the Pinion Patent—"Ex-Dalzell Patent No. 5," not printed in the record. This patent is the property of the Dueber Co., as well as the others, but I did not think it desirablo to enlarge this brief by a reference to that part of the correspondence. The above is the first time, *so far as this correspondence shows*, that he attempted to deal with the crown patents as his own. But, *facillus est descensus*, he would indeed be an inexperienced individual who would be astonished when told that while Dalzell's first intention may have been only to blackmail the Dueber Co.; he ended by a determination to steal the patents.

Under date of Sept. 23d, 1885, Whitney writes Dalzell, p. 215:

"My Dear Sir: Have just received a letter from Mr. Critchley, written by your request. I intended to write to him to-day, to ascertain your private address, as it will be much better for me to write direct to your house than to the factory, inasmuch as should the Co. know that we were carrying on communication with each other, it would *give rise to suspicion* and perhaps make it *unpleasant for all parties concerned.* Therefore you will excuse my inclosing this letter in the one I write Mr. C. . . ."

". . . Now in regard to the Company Mr. C. mentions in his letter *and of which you spoke to me when last in Cinn.* Will they manufacture the *pinions?* If not, why not carry on negotiations with the Waltham, *as we discussed at length some time ago?* . . ."

"In regard to paying final fees on cases already allowed, I would not dare to use the money the Co. sent me without their permission. However, you are the client, and if you authorize payment of fees, I will do so; but it would be best for you to send me your individual money for this purpose; then there can he no kick, and I will send the fees on and have the patents issue at once. If there is to be any assignments, the patents can be assigned after issue as well as before. I will send them direct to you, and, should the Co. then ascertain that they were issued, I shall only say you authorized it. You have given all orders in these matters, and are the only one whom I can look to for orders or explanations. . . . This will be your best and saftest plan; send me draft for $120.00, and I will have papers issued at once. In the meantime, you can show the Company (the new company) your notices of allowance, and refer them to me for detail information. I will give the thing a send off, you can rest assured. I look after your interests as carefully as if they were my interests.

"By your sending the money to pay finals should the company at any moment call upon me to refund their money I would be in position to do so, and you would be under no embarrassment.

"Would be pleased to have you make me a visit. Let me hear from you very soon. Every thing progresses favorably. . . ."

It is well to observe at this point that this is the first suggestion from any of these conspirators, that the record shows, that the payment of all moneys by the Dueber Co. would be a difficult matter to dispose of consistently with their programme. It is evident that consultations have been had demonstrating the necessity of some action, to obliterate, or obscure, the evidence arising from the money transactions.

On the 24th Sept., Dalzell answered the above, p. 217. "Mr. Whitney—My Dear Sir—your favor of the 23d is at hand. . . . Mr. Whitney, inclosed you will find draft for $80.00, eighty dollars, all the money that I am able to send just now; with it forward to Washington for claims allowed, *as the papers will be very useful to me in forming the company that Mr. Critchley spoke to you of in his letters.* . . . I regret not being able to send on the full amount of final fees. Please *send on the amount due for all allowances*, so that I can set the ball a rolling here. *I thank you for the hint regarding our correspondence.* Address to me Post Office till called for, as we call twice a day. . . ."

"P. S. . . . Thank you for advice."

On the 26th Whitney answered the above, p. 214, in which the following occurs: "This you could arrange for after Co. is organized. *Will do any thing I can to assist you to your rights* and YOU CAN ARRANGE THINGS TO SUIT YOURSELF." ". . . Mr. Dalzell, I wish you all the success in the world in your new enterprise. You can notify the new Co. that your patents will issue Oct. 27th, I will send papers to you immediately on their arrival. *Think it best to send your letters in a plain envelope.* . . ."

I observed on a former page that this man, Whitney, recognized that it was his function to do dirty work and ask no questions. Does not this support that assertion?

The record does not furnish material for the accurate characterization of this new company, but can there be doubt that it was a scheme arranged, after the failure to blackmail the Dueber Co. had become evident, to manufacture crowns according to the inventions in dispute? It fell through for want of funds.

In order to thoroughly understand the aim of these people, in paying this $80.00, to be the preparation of evidence for the future conflict, it will be necessary to read Dalzell's testimony, A. 268 to 328, pp. 59 et seq., and I hope Your Honors will find time to read it.

From this testimony it appears that it was no part of their scheme to advise the Dueber Co. that Dalzell had forwarded money to pay a portion of the final fees; that it was not their intention to return to the Dueber Co. their money or any part of it; nor have they so advised or offered to repay the Dueber Co. up to the present day. Let it be recollected the Dueber Co. paid $120.00, the final fees, on the 24th of June, 1885, to Whitney; while Dalzell says he sent his $80.00 on Sept. 24th, 90 days after the Dueber Co. sent their remittance.

Dalzell persisted that he was not aware *when he sent the* $80.00 *to Whitney, that the Dueber money had been sent* 90 *days before*, and that he first learned of the Dueber money being sent about the latter end of September, A. 291, p. 63. His reason, as he says, for not advising the Deuber Co. that its money would not be used, was that he did not know the Dueber money had been sent. In this, as stated, he persists, off and on, from the 290th to the 299th A., when, after an adjournment, he came in and voluntarily offered for the inspection of counsel for appellee two of the above letters, viz.: letter from Whitney to Dalzell of Sept. 23d, ante, p. 60, and letter from Dalzell to Whitney of Sept. 24, ante, p. 61, this with the intention of exhibiting his honesty and candor. He admitted he was mistaken in saying that he did not know that Whitney had the Dueber money when he sent the $80.00. The admission was that he knew this fact *only when he received the letter from Whitney dated Sept. 23d.* During the intermission he had, of course, examined these Whitney-Dalzell letters above referred to—none of which had yet been offered in evidence, and the existence of which was unknown except to himself, as Dalzell thought—and selected the two that he thought harmless, and which, taken by themselves, would not only practically confirm Dalzell's story of his want of knowledge of the sending of the Dueber money, but would, at the same time, illustrate his frankness and honesty in showing his private correspondence!! In the cross-examination following the above, Dalzell still persisted that he had no knowledge of the sending of the Dueber money, or its possession by Whitney, until advised by the above letter from Whitney; and said that there was no correspondence—or he had no recollection of any—between June 24th and Sept. 23d, 1885, between himself and Whitney—this notwithstanding the examination of this correspondence, then in his pocket, during the recess occurring not more than fifteen minutes prior to the question 303. Q. 305 asked him whether, in view of the fact that he had voluntarily produced some of this correspondence, he would now produce the letter written to him upon July 11th by Whitney? See this letter, ante p. 57–8.

Whereupon his counsel makes a statement upon the record (pp. 65–6), and offers this letter and others. If his counsel had only let him alone he would have stuck to his denial—Dalzell-like.

If this little piece of funny business, of producing the two (immaterial?) letters, and swearing there were no others, was not so thoroughly characteristic of Dalzell, I should have been tempted to say that he had assistance, during that intermission, in arranging so nice a plan.

When Dalzell was presented with the fact that he did know on the 11th of July, *if not earlier*, of the Dueber money for final fees being in Whitney's possession, and was asked for an explanation of the circumstance that he did not advise the Dueber Co., if he did not intend their money should be used, his answer 306, p. 66, simply admitted his prior mendacity; and, as I understand his language, added in effect that having failed to blackmail the

Dueber Co., he had determined to steal the crown patents; and, as a means to that end, had determined to forward the fees, or part of them, himself.

But did he not know earlier than the 11th of July of Whitney's receipt of Dueber's check for $120 for the payment of final fees?

If Your Honors will now look at p. 245, you will observe that "Resp'd't's Ex. Whitney Letter No. 3," the letter written for the final fees by Whitney, was addressed to Dalzell!! Its date is June 22d. Mr. Dueber testified, A. 32, p. 228, that Dalzell brought that letter to him—Dueber—personally.

(While upon this matter of paying bills I will ask Your Honors' attention to the exhibits upon pp. 242 to 245, and preceding the one just referred to, where it will be observed that *all* preceding ones are addressed directly to the Dueber Co. A comparison of these dates and addresses shows that the plot (at that time) was thickening rapidly.)

In A. 286, Dalzell insinuated that the Dueber money had been made a special deposit to the credit of that company, but his subsequent answers, up to the 298th, make it apparent that this was pure fiction—that money was all used in the payment of final fees, except $20 (the sixth patent never having been granted), which is still in the pockets of Dalzell, or in that of "his own counsel."

3D. DALZELL RAN AWAY.

I submit that the fact that Dalzell ran away from Newport may well be taken into consideration while discussing the question of conspiracy, especially as he has denied that he ran away; and among the testimony just referred to he stated a conversation that he alleged he had with Mr. Dueber upon the subject of his leaving. A. 319, p. 67. And in his 108th answer, p. 32, and before it appeared in our testimony that Dalzell had run away, he stated a different conversation which he alleged he had with Mr. Dueber, and as having occurred at that time. Mr. Dueber testifies, A. 78 to 80 inc., pp. 330–1, that there was no such conversation as Dalzell alleged in his 108th; that Dalzell asked him for the privilege of being out during the afternoon (Jany. 18, 1886), which request he granted; and subsequently saw him in a street car, with his wife, crossing the Ohio River to Cincinnati; that he did not know Dalzell was going away, and did not discover that fact for a few days; that he had a messenger call at Dalzell's house every day to inquire about him, until he found out where he was.

George Marx Miller, pp. 414–5, testifies that he is a clerk for the Dueber Co.; that he was instructed to call at Dalzell's house and inquire for him, and that he did, upon two successive days, call at Dalzell's house and inquired for him; that upon each visit "Mrs. Dalzell came to the door and told me (the witness) Mr. Dalzell *was away and would be back in a day or two.* . . ."

If any of Dalzell's statements of conversations with Dueber about going away be true, it follows, of course, that Miller is a willful perjurer. Dalzell has testified twice since Miller testified, but he has not again adverted to that subject.

Two or three days before he went away, he told the then superintendent of the Dueber Co., John A. Coburn, an old acquaintance of his, *in confidence*, that he was invited to deliver a lecture upon crown making before a crown-makers association in N. Y. or Brooklyn, and that he thought he would go. A. 19, p. 452.

But it is established, beyond doubt, that he went in pursuance of a letter from Joseph Fahys to work for him, either in the Fahys' watch case company, or in the Brooklyn watch case company, in which Fahys was also interested. This will be referred to later under another heading.

Under this heading, the testimony about Dalzell stealing the crown tools, his friends following him in a few days after he ran away, and advising the other hands employed upon crown making to leave in order that that department should be broken up, all sufficiently adverted to elsewhere, should be appropriately considered. Ante, p. 45–6.

And, being considered, is there not ample proof of a conspiracy, dating as early as Dalzell's first approach to Dueber, to have the crown tools patented, though it is possible that the exact objects of such conspiracy were not definitely stated until later?

ALLAN C. DALZELL HAS BEEN SUCCESSFULLY IMPEACHED AS UNWORTHY OF BELIEF.

When Your Honors have progressed this far in the examination of this case, it is at least doubtful whether you will think it necessary to make any special examination before coming to the conclusion that Dalzell is utterly unworthy of belief, but, as the evidence is in the record, I will refer to it.

The following witnesses have sworn, that they knew his reputation for truth and veracity; that it was bad, and that they, severally, would not believe him under oath:

Piper, A. 93 to 95, p. 309; cross A. 147 to 154, p. 314.
Bradley, direct A. 66 to 68, p. 355; cross 111 to 118, pp. 359 to 360.
Schleininger, direct A. 7 to 9, p. 363; cross A. 10 to 14, p. 364; re-direct A. 30 to 31.
Detmering, direct A. 16 to 19, pp. 366 to 367; cross 30 to 36, pp. 367 to 368.
Mesinger, direct 37 to 41, p. 385; cross 57 to 59, p. 386.
Cook, direct A. 48 to 51, p. 391; cross A. 70 to 76, pp. 392 to 393.
Brown, direct A. 10 to 12, p. 394; cross 13 to 17.
Born, direct A. 17 to 19, p. 406; cross 22 to 27.
Wadsworth, direct A. 5 to 8, p. 408.
Bady, direct A. 20 to 22, p. 412; cross 23 to 25.
Miller, direct A. 9 to 11, p. 415; cross 10 to 15.
Luthy, direct A. 27 to 29, p. 436.
Reichhelm, direct A. 10 to 12, p. 444.
Ohl, direct A. 11 to 13, p. 447.
Koester, direct A. 4 to 6, p. 448.

Coburn, direct A. 43 to 45, p. 455.
Hewitt, direct A. 6 to 8, p. 457; cross A. 9 to 25.
Metcalf, direct A. 5 to 7, p. 460; cross A. 8 to 14.
Dutton, direct A. 5 to 7, p. 462; cross 8 to 12.
Wilcox, direct A. 4 to 7, p. 463.
McLaughlin, direct A. 42 to 45, p, 156.

Where no cross-examination is referred to above, such witness was not cross-examined upon this subject.

Eleven of these witnesses knew of Dalzell's reputation while he was employed at the Dueber factory, and one of these eleven, Piper, spoke also of Dalzell's reputation in Newark, N. J. Six spoke of his reputation in Elgin, Ill., where he had worked during the year 1880, while four of them spoke of his reputation in N. Y. city, where he had been located some years prior to his going to Elgin.

The record furnishes quite a number of illustrations of Dalzell's capacity in this line, in addition to those incidentally pointed at while discussing other subjects. I will point to a few of them.

Dalzell in his 15th to 17th A., p. 169, and 77th to 80th A., p. 176, refers to a certain "Nicole Letter," and swears emphatically that he saw this letter in the hands of Mr. Dueber, and asked the examiner, *of his own motion*, to underscore his testimony upon that point.

Mr. Dueber testifies, A. 5–8, p. 521, that he never saw the letter. Of course, if Mr. Dueber ever had the letter, it could only have been obtained out of his office by theft. The correct explanation of it, however, is that Dalzell's confederate, Naul, procured it in London for the benefit of the Dueber Co., but when he returned to Newport (April 7, 1885, Naul's testimony, A. 31, p. 96), he entered the conspiracy, then well under way, and, instead of turning the letter over to the Co., for which it was intended, he gave it to Dalzell.

Dalzell's transactions with the Elgin Mining Company furnish a good illustration of the facility with which he misrepresented every thing, but it is too lengthy to explain it in detail here; the deposition of George Hewitt, pp. 457

et seq., together with so much of the Dalzell-Hewitt correspondence as is embraced in the three letters dated respectively May 10th, May 18th, and May 25th, 1880, pp. 471 et seq., gives a birds-eye view of this matter.

The deposition of Adolph Luthy, pp. 433 et seq., furnishes another, and more life-like illustration of Dalzell's capacity and habits in this regard. Luthy and Dalzell were in partnership for the manufacture of certain articles; Luthy furnished substantially the whole capital of the concern, while Dalzell was to give the matter his personal attention and time. Dalzell gave a mortgage upon the machinery and other assets of the firm to his wife; whereupon Luthy commenced legal proceedings for a dissolution of the partnership. During these, in the city of New York, Dalzell came before the referee and swore that he never was in partnership with Adolph Luthy; that he, Dalzell, never had any transaction with Luthy; that the latter never was in his place of business, *i. e.*, the partnership shop, 207 Center St., N. Y.; in short, that he had never seen and did not know Luthy. After that, however, proceedings being on the tapis to have Dalzell indicted for perjury, Dalzell ran away from New York; and the remainder of the proceedings in that suit were *ex parte*. Dalzell then went to Elgin, Ill., and did not return to N. Y. until he ran away from Newport, carrying with him the Dueber crown tools.

Stricker testified to Dalzell's stealing a piece of fine gold of about twenty pennyweights from the Dueber factory. I don't refer to this for the purpose of pointing out the theft, but because the incident illustrates well Dalzell's incapability of telling the truth. It is referred to in three depositions. The first is Stricker's, pages 369 et seq.

His answers 47, 63 to 71, and 159a to 161, in this deposition, relate that Dalzell placed the 20 dwt. of gold upon a pole of the battery or dynamo, then being in operation, and telling the boy Stricker, that he was going to dissolve it in the solution. It was attached by a piece of copper wire to the positive pole (*Stricker here said*) of the dynamo used for gilding cases. Dalzell then sent the boy out of the gilding room for some hot water. He was absent about three minutes, and when he returned, Dalzell went to the dynamo, and after examining, told the boy that the gold was all dissolved in the solution—dissolved in three minutes. The boy's credulity was sorely taxed, but his youth and inexperience kept him from saying any thing; but he examined the copper wire that had been immersed with the gold in the solution, and found it intact.

Dalzell testifies in reply to this at pp. 168 et seq. His answers 10 and 46 to 73; pp. 173 et seq., refer to this subject.

He admits that the incident occurred, and attempts an explanation. The boy having said that Dalzell placed the gold on the positive pole of the dynamo, he denies that, and stated that he placed it on the negative pole. While it is quite evident that Dalzell here said negative because the boy said positive, yet here Dalzell was right about it. He did place it on the negative pole. The boy called the pole upon which Dalzell placed the gold "positive," because Dalzell, in his ignorance, when instructing the boy, reversed the names of the poles. In his 10th answer, Dalzell quoted from a book, which he offered in evidence; and if he had been able to understand what he so pompously referred to, to explain his gold trick, he would have known that no substance whatever placed upon the negative pole would dissolve. Dalzell says the gold was suspended in the solution three-quarters of an hour; the boy says three minutes. Dalzell said (A. 54) that he could have dissolved it in fifteen (this is mistakenly printed ten) minutes. Is not this a distinct admission that the gold could not be, and was not, dissolved? He, Dalzell, feeling the difficulty about the wire not dissolving, said it was one-eighth of an inch thick, and declined absolutely to state which pole of the Dueber dynamo, was the positive, and which the negative pole. But Dalzell did not deny that, at the time he placed the gold upon the negative pole, the positive pole had a piece of gold upon it. As a piece of gold is permanently upon the positive electrode he could not deny that, and as gold could not be dissolved from both poles at the same time, here was a case where even Dalzell's genius could find no loophole for escape..

Stricker was recalled, p. 500. His testimony from A. 2 to 15, is upon this subject.

He says that Dalzell did not put a porous cell into the bath, as was stated by Dalzell; and that there was no such thing as a porous cell in the Dueber factory at that time; that when Dalzell put the gold upon the negative pole the positive pole had a piece of gold upon it, and that the thickness of the wire, used to suspend the gold by Dalzell, was such that the boys around the factory commonly used it to sew buttons on their pantaloons when they—the buttons—accidentally dropped off.

Subsequently to the taking of the last Stricker deposition, Dalzell again testified in the cause, but he made no further effort to patch this story.

And for another *thoroughly* characteristic one, see Critchley's 48, p. 487.

Dalzell told Bradley, A. 60, p. 354, that he had made crown tools for a party in New Jersey; and told Detmering, A. 15, p. 366, that his father had made crowns, and he thought he could try; but, to any one who has had experience in tracing pedigree, his 17 A., p. 18, will probably appear to be the neatest work of this kind that Dalzell has attempted. In that he stated that his family for TWELVE GENERATIONS had been engaged as machinists in watch making and jewelry. Twelve generations would measure back—three to a century—400 years—to the reign of Henry VII in England and prior to the use of watches. There is a massive ease and graceful rotundity about this that genius only could hope to rival.

FAHY'S WATCH CASE CO.

So far, nothing has been said directly as to the status of the above concern in this litigation, and but little needs to be said.

"Respondents' Exhibit Dalzell Fahys' Assignment No. 1," p. 540 shows the interests conveyed to the Fahys Co. by Dalzell, prior (as Dalzell and the Fahys Co. allege) to the commencement of this suit. The exhibit is a certified copy of a contract whereby Dalzell agrees to work for the Fahys' Co. for three years, at forty dollars per week. It transfers an exclusive license to that Co., in Dalzell's inventions, in issue here, patented and unpatented, for and during the period of Dalzell's employ by said Co., and a general license, but not exclusive, for the full term of such patents. Subsequently to the filing of the bill in this case, the whole interest in the Pinion Patent, "Dalzell Patent No. 5," was transferred by "Respdt's Exhibits, Dalzell-Fahys' Assignments" Nos. 2 and 3, pp. 542–3; and, by a still subsequent assignment, not in evidence, as appears by the testimony of Henry F. Cook, A. 22, p. 275, Dalzell assigned his entire interest in all these patents to the Fahys' Company.

The Fahys' Co., when it took its first interest in these patents, knew that the inventions were in use in the Dueber factory; had the means of knowledge, if not the absolute knowledge, in its possession, that the patents belonged to the Dueber Co., and not only neglected, but refused to inquire about the matter.

Dalzell met Joseph Fahys, and Henry F. Cook, at a hotel in Cincinnati, about the 13th or 14th of January, 1886, exhibited to them the drawings of the patents in issue, and explained to them the mode of making crowns by means of the tools shown therein; told them the crowns could be made very cheaply, by means of the tools embodying these inventions, and informed them that the inventions were then in extensive use in the Dueber factory, for the manufacture of crowns, and that he was employed by the Dueber Co., at that time, making crowns, in accordance therewith. Dalzell asked for a situation and to introduce this method of making crowns into one or the other of the factories represented by Fahys; and offered to take forty dollars per week for his time, with a contract for three years, and said he was willing to negotiate with Fahys to manufacture his crowns, either on a license fee, or that Dalzell should have an interest in the profits arising from the manufacture of the crowns by these inventions. Dalzell told them

—Fahys and Cook—that he had worked on the process of making crowns when he worked for Duhme, and that "he had made the machinery to perfect his crowns while he was working for Dueber." Fahys informed Dalzell that he should consult his associates in business when he returned home, whether he could give Dalzell a position, and would write the result to him promptly.

I only stop here to say that neither Fahys nor Cook, although advised that the inventions were then in use in the Dueber factory, and that the tools for making the crowns had been made there, ever made any inquiry from the Dueber Co., or from any body else, as to whether the Dueber Co. had, or claimed to have, any interest in these patents.

Fahys left Cincinnati on the evening of the 14th of January for home, taking drawings of the patents with him, and arrived on the morning of the 16th, and upon that day consulted with his partners in the Brooklyn Watch Case Co., with reference to the employment of Dalzell, and the starting of a crown department in their factory, and upon the refusal of the Brooklyn Watch Case Co., to go into that little speculation (the reason for which will appear further along), he immediately wrote Dalzell to "come at once," vide Fahys' letter, to Dalzell, p. 290. Dalzell, by the usual course of mail, would receive that letter on the morning of the 18th. He did not stop on the order of his going—he went out of the factory at noon of that day, after having obtained permission from Mr. Dueber, to be absent half a day. Ante, p. 64 et seq.

Fahys' dep., pp. 248 et seq., A. 19, 41, 44–50, 54–62, 66–71, 80–84, 93, 94.

Dep. of Henry F. Cook, pp. 277–8, A. 32–34, 39–44.

On the 2nd of February, about ten days after Dalzell's arrival in New York, the Dueber Co. had a circular letter prepared and sent to the trade, and a copy of it was received by Mr. Cook, at the Fahys factory in Sag Harbor, and also one by Mr. Fahys, at his office in N. Y. city, all by due course of mail. This letter is printed at p. 241.

Your Honor's attention is directed to its contents at this point. It will be observed that this was received before the Fahys Co. had gone to any expense for the establishment of a crown department. Cook, 60-66, pp. 280-1.

It further appears that upon the receipt of this letter, neither Fahys nor Cook made any inquiry about the truth of the statements contained in the circular letter, and neither of them ever suggested such a thing, but went right on to manufacture under these inventions.

Fahys dep., A. 59-60; p. 253.
Cook " " 71-73; pp. 281-2.

It appears by Fahys' 108, p. 263; and Cook's 73, p. 282, that Mr. Hays, of Wheeler, Parson & Hays, had given Dalzell so good a reputation, that these gentlemen felt themselves exonerated from making inquiries about Dalzell; that is to say, that notwithstanding the suspicious circumstances surrounding Dalzell's claim to be the owner of these inventions, and notwithstanding the direct notice from the Dueber Co. that the inventions in question were its property, the reputation for purity that Daizell had received from Hays more than counterbalanced all other considerations!

Under these circumstances, it may be as well to look at what information Mr. Hays had upon this subject. Fahys says, in his answer last referred to, that Hays made inquiry from Mr. Luthy, and he also mentions the firm of Peterson and Company. And Mr. Cook, in his answer last referred to, says that he had his information as to the character of Dalzell direct from Hays. Turning to the deposition of Mr. Luthy—for Mr. Fahys' partner, Hays, was not called; Fahys and Cook evidently preferring to rely upon hearsay evidence—A. 20, p. 435, it will be observed that Mr. Hays, when he called upon him, stated that he was referred to him, Luthy, by the firm of Peterson & Co.. so that, it is a fair inference, Peterson & Co. said nothing, knew nothing, about Dalzell.

And now see the character that Luthy gave to Dalzell! To fully appreciate it, it will be necessary to recall or re-read the whole of Luthy's deposition. Vide Ante, p. 68.

The above references being borne in mind, it is now appropriate to re-call attention to the fact that Wheeler, Parson & Hays, after they had received the report of Mr. Hays, as to who and what Dalzell was, declined to have any thing to do with him. Fahys' A. 19, p. 248, and A. 65, p. 254.

In answer 19, Mr. Fahys says he "*was very anxious to close an arrangement* AT ONCE with Mr. Dalzell."

Hays' report did not have the effect of taking the keen edge from Fahys' anxiety evidently; and it is not to be expected that Fahys—being already advised by Luthy, through Hays, that Dalzell was in every way a scoundrel—would thenceforward betray much anxiety to learn what rights the Dueber Co. had in these inventions.

I can not directly impeach these men Fahys and Cook, as they were called to testify by the Dueber Co.

Our ignorance as to what had occurred between Dalzell and them, and what relation then existed between them, as to these inventions, in a measure compelled me to put them upon the stand right at the start; but I have a right, nevertheless, to show, and submit that I have shown, that their own depositions convict each of them of deliberately entering into this Dalzell conspiracy; whether to punish a hated competitor, or to steal his property, I don't think it material at present to inquire.

Walker on Patents, sec. 281, and cases cited.

If any charitably-minded person be desirous of finding an explanation of the conduct of Fahys and Cook, consistently with honesty of motive, I would advise such to take *also* into consideration, before coming to a conclusion, what took place at their factory upon the occasion of Dalzell's arrest. Henry F. Cook had at the factory a plush case full of Dueber's work—samples is the polite name for them—that Dalzell had brought there and given to him. When Dalzell was arrested his first fear was lest the officers should get hold of that piece of implicating evidence, and he dispatched Critchley, being under arrest himself, to the factory to advise the hiding of it. When Critchley arrived at the factory he was told by "one of Mr. Cook's book-keepers that said samples had already been taken good care of." A. 41–2, p. 486.

Would any honest impulse have immediately prompted the secreting of this evidence of Dalzell's guilt?

Nor can it be said, I fear, that Fahys was innocent of this, although his office was in New York City.

John Price states that Dalzell exhibited this case of samples to Mr. Fahys at the latter's office during the first week of his arrival in New York, January, 1886. "Fahys said they was very nice." A. 66, p. 423.

The material exists in the depositions of Fahys, pp. 247 et seq., Henry F. Cook, pp. 273 et seq., and the re-cross of Dalzell, pp. 75 et seq., in connection with the "Dalzell-Fahys Assignments," 1, 2, and 3, pp. 540 et seq., and a comparison of their several dates with the respective dates of their being recorded in the patent office, to prove that the first of these, No. 1, was not signed on the date it purports to have been signed, viz., January 21, 1886, nor until after the receipt by the Fahys Co. of "Resp'dt's Exhibit Notification to Fahys Watch Case Co.," p. 241.

I do not think it necessary now to analyze this, but will give a few pointers.

1st. Fahys and Cook repeat and persist in many forms throughout their depositions that it was signed upon the 21st of January.

2d. Dalzell testified subsequently to Fahys and Cook; and having learned that the tale of the signing on the 21st had a hitch, and being advised "by his own counsel," A. 340–351, p. 69, that he, Dalzell, was in Springfield, Ohio, on the 20th of January, and could not have arrived in New York before the evening of the 21st, fixed the date of signing upon the 22d, A. 338–9, p. 69.

3d. During re-cross-examination, pp. 75 et seq., he receded from the 22d, but still psrsisted that it was signed upon the 28th of January.

4th. This contract that is dated January 21st was not recorded until the 15th day of March following, p. 541, bottom of page. Contrast this with No. 2 of this series:

it is dated March 31st, and recorded April 2d following; and No. 3, which is dated April 12th, and recorded April 14th, pp. 542 et seq. But in view of the foregoing demonstration that Fahys and Cook had actual notice that the Dueber Co. were then in possession of the inventions, that Dalzell was dishonest, and that they refused to further inform themselves in the premises, it is thought unnecessary to further explore these matters.

In the Circuit Court there was an effort made to show that, under the authorities, a case had not been made by appellee for specific performance. I anticipated no such discussion, nor did I reply to it orally or by brief; nor do I now see the necessity for, or appropriateness of it in this case, assuming the facts, as they appear in this record to be understood and appreciated, and this for the following reasons, which I submit:

1st. The appellants have both been guilty of fraud, and no fraud has been brought home, or even charged, to the appellee.

2d. If this were a case where the consideration given for these inventions should be narrowly scanned, which it is not, there is no proof in this record of its inadequacy. There is not a word of testimony in the record indicating the opinion of any man of its inadequacy, until after the appellee had fully complied with all its obligations, and Dalzell, by the grant of the patents to him, had been put in possession of the means of blackmailing the Dueber Co. And there is nothing in the record now to indicate it except the testimony of Dalzell and Fahys, and the obvious purpose of that being to enable them to consummate their theft of these patents, their testimony, I submit, ought to be examined, if at all, by the light shed upon it by their own actions.

There is no evidence of any sale of, or license under, these patents, since they were granted, except the transaction between Dalzell and the Fahys Co. Let us look at that.

It appears by "Dalzell-Fahys Assignment No. 1," p.

540, that Dalzell gave an exclusive license under all the patents in issue here, and under all other patents that should be granted to him in this art, whether the inventions were in existence, or had yet to be discovered, to the Fahys Co., while he should remain in its employ, and the only consideration for this was to be $40.00 per week, to be paid to Dalzell for his labor for three years, and if he should leave the employ of the Fahys Co., and whenever he should leave, such license should cease to be exclusive, but the Fahys Co. should retain, in any event, a general license until the expiration of all the patents.

The question here is: How much of that $40.00 per week was for his labor, and how much for the exclusive license?

Henry F. Cook, secretary and treasurer of the Fahys Co., answers that question in his 91st answer, p. 284; viz: "Outside of Mr. Dalzell's patents, or without taking them into consideration, I think Mr. Dalzell could command a salary of from $75.00 to $100.00 a week." It is possible that the *alleged* inadequacy does not so much refer to the financial value of these inventions in the market, or trade, as to their value as lethals—things to hurt a hated rival?

Appellant's strong point, however, was that it would not be equitable, under the circumstances here proved, to order a conveyance of these patents to appellee. Just think of it a moment, if Your Honors please, here comes a man all but admitting that he stole, or is trying to steal, these patents, and, associated with him, men who had knowledge of the theft—that is knowledge that the man was disreputable (vide p. 73, ante), and means of knowledge of the theft itself, but declined, from motives of prudence, to make inquiries at the proper place—and say: it is true that these inventions were made in appellee's factory, by its workmen, wholly at its expense, and for its benefit; it is further true that they were patented at its expense, though by our connivance and procurement—for if they had not been patented the appellee and others could have used them as well as ourselves—it is also true that Dalzell agreed that the inventions were, and patents should be, the property of the appellee, if it should pay all the expenses incident to their procurement, and it is finally true that the appellee fully complied with the terms of its contract—but then it is not equitable, etc.

If Your Honors please I will stop there, and permit my friends upon the other side to say the rest—and, if they know of authorities tending to sustain their contention, they may discuss them, I know of none such.

Respectfully submitted,

JAMES MOORE,
Appellee's Counsel.